Supreme Court, U.S.
FILED

No. 02-1810 JUN 9 - 2003

In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTIONS PRESENTED

1. When this Court directs a court of appeals to reconsider its original decision in light of a more recent decision of this Court, does the law of the case doctrine preclude the court of appeals from doing so?

2. When the plaintiffs prevail in a suit against state officers, in their official capacities, in a suit not involving the vindication of individual rights protected by the Fourteenth Amendment, does sovereign immunity bar an award of attorneys' fees against the State's treasury?

3. Assuming that sovereign immunity does not bar an award of attorneys' fees, do constitutional principles of dual sovereignty – including sovereign immunity – preclude an interpretation of 42 U.S.C. § 1988(b) that discriminates against the States?

PARTIES TO THE PROCEEDINGS

The petitioners are two officials of the Virginia State Corporation Commission. Sued only in their official capacities. They are: (a) E. Joseph Face, Jr., Commissioner of Financial Institutions, and (b) Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions. Hancock is the state officer charged with the enforcement of *Virginia Code* §§ 6.1-330.83 and 6.1-330.85 and is responsible to Commissioner Face for her actions.

The respondent, National Home Equity Mortgage Association, is a trade organization of home mortgage lenders.

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PETITION FOR WRIT OF CERTIORARI

Two officials of the Virginia State Corporation Commission, E. Joseph Face, Jr., and Susan E. Hancock (collectively, "the Commonwealth"), respectfully petition this Court for a writ of *certiorari* to review the judgment of the court of appeals, which declined to reconsider an issue expressly remanded to it by this Court and which also upheld an award of attorneys' fees against the Commonwealth contrary to principles of dual sovereignty.

INTRODUCTION

This is the second time the Commonwealth has sought certiorari in this case in connection with the award of attorneys' fees. Its original petition, No. 01-1827, was granted, the judgment vacated, and the matter remanded to the court of appeals for reconsideration in light of *Gonzaga University v. Doe*, 536 U.S. 273 (2002), a decision sharply limiting the availability of suits under 42 U.S.C. § 1983. *See Face v. National Home Equity Mortgage Association*, 123 S. Ct. 69 (2002). However, on remand, the court of appeals declined to reconsider, erroneously holding that the law of the case doctrine deprived it of the power to comply with this Court's directive. Thus, the Commonwealth returns to this Court seeking enforcement of the relief granted on the previous petition. Specifically, the Commonwealth asks that certiorari again be granted, that the judgment below again be vacated, and that the case again be remanded – with an explicit directive to reconsider whether, in light of *Gonzaga*, this suit states a claim under § 1983. Alternatively, if the Court declines to grant such relief, then the Commonwealth seeks review on the two questions raised in the original petition, relating to the interplay between constitutional principles of dual sovereignty – including sovereign immunity – and statutory provisions dealing with awards of attorneys' fees.

OPINIONS BELOW

The following five decisions are relevant to this petition: (1) On remand from this Court, the court of appeals declined to revisit its previous decision, ruling that the law of the case doctrine precluded it from doing so. This opinion is reported at 322 F.3d 802 (4th Cir. 2003) and is reprinted in the appendix to this petition at App 1. (2) This Court denied respondent's petition for rehearing of this Court's decision to remand the case to the court of appeals. This decision is reported at 123 S. Ct. 651 (2002) and is reprinted at App. 5. (3) This Court granted the Commonwealth's previous petition for certiorari, vacated the judgment of the courts of appeals, and remanded the case for reconsideration in light of *Gonzaga*. This decision is reported at 123 S. Ct. 69 (2002) and is reprinted at App. 6. (4) The court of appeals held that the law of the case doctrine precluded reexamination of whether this suit was a claim under 42 U.S.C. § 1983 and upheld an award of attorneys' fees against the Commonwealth's treasury. This decision is reported at 283 F.3d 220 (4th Cir. 2002) and is reprinted at App. 7 (5) The district court entered an award of attorneys' fees against the Commonwealth's treasury in an unreported decision reprinted at App. 22.

JURISDICTION

The court of appeals entered its judgment on March 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the following constitutional and statutory provisions.

1. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1]

2. The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State."[2]

3. The first federal statute at issue, 42 U.S.C. § 1983, provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State. . . . subjects . . . any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding."

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[1] As this Court observed: "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States,* 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

[2] While the Eleventh Amendment confirms the existence of the States' sovereign immunity, it "does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 753 (2002). *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment").

4. The second federal statute at issue, 42 U.S.C. § 1988, provides, in pertinent part: "In any action or proceeding to enforce a provision of sections . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . . "

STATEMENT OF THE CASE

The respondent – the National Home Equity Mortgage Association ("NHEMA") – is a trade association of home mortgage lenders. NHEMA challenged the constitutionality of *Virginia Code* §§ 6.1-330.83 and 6.1-330.85, which limited the ability of state-chartered financial institutions to impose penalties on consumers who pre-pay their mortgages (*e.g.* when a homeowner refinances or sells his home). Specifically, NHEMA contended that the two state statutes were preempted by a federal law, the Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801 ("the Parity Act"). The district court agreed with respondent and entered a permanent injunction prohibiting the petitioners from enforcing these statutes. *See* 64 F. Supp. 2d 584 (E.D. Va. 1999). On appeal, the Fourth Circuit affirmed, basing its decision on federal preemption and making no mention of § 1983. *See National Home Mortgage Ass'n v. Face,* 239 F. 3d 633 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001).

Following the Fourth Circuit's decision on the merits, the district court turned its attention to the petition for attorneys' fees and costs, filed by NHEMA under § 1988 ("the fee petition"). The Commonwealth defended against the fee petition on three grounds. First, the Commonwealth argued that NHEMA's suit was not a claim under § 1983. As a suit seeking declaratory and injunctive relief against state officers, in their official capacities, on the basis of federal preemption, the proper procedural theory was the Supremacy Clause – not § 1983. Because there

was no § 1983 claim, there was no basis to award respondent attorneys' fees under § 1988.

Second, even if NHEMA's suit was a § 1983 claim, sovereign immunity bars an award of attorneys' fees against the Commonwealth where Congress has not acted under § 5 of the Fourteenth Amendment to abrogate that immunity. Here, the relevant federal law – the Parity Act – was not enacted under Section 5. It was enacted under the Commerce Clause. There is a fundamental difference between a suit to protect *individual rights* guaranteed by the Fourteenth Amendment and a suit that seeks to vindicate the supremacy of Congress' Article I powers. While a suit to vindicate such individual rights might not be barred by sovereign immunity, a suit against a State to vindicate the supremacy of the Article I powers is barred. The same distinction logically applies to an award of attorneys' fees.

Third, even if sovereign immunity does not absolutely bar an award of attorney's fees under these circumstances, principles of federalism and sovereign immunity nevertheless require that the States be treated *no less favorably* than other litigants. Section 1988, as currently interpreted, violates these principles because States are almost always required to pay attorneys' fees when they lose a lawsuit under § 1983, but are almost never allowed to collect attorneys' fees when they prevail. As a constitutional matter, when there has been no abrogation of sovereign immunity, prevailing state defendants and prevailing private plaintiffs should be treated alike. Moreover, the most appropriate standard to use in such an even-handed approach is the one that now governs awards to prevailing state defendants. Fees should only be awarded to a prevailing party if the opposing party's legal position is frivolous, unreasonable and without foundation. No one has suggested that the Commonwealth's position meets these criteria. Thus, the fee petition in this case should be denied.

The district court rejected all three arguments. It found that, because the Commonwealth had not sought review of the district court's determination that the suit was a § 1983 claim when the Commonwealth appealed the decision on the merits, the law of the case doctrine precluded reexamination of the issue. The district court also found that this Court's decisions in *Hutto v. Finney*, 437 U.S. 678, 695 (1978), and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) foreclosed the Commonwealth's second and third arguments.[3] On appeal, the Fourth Circuit affirmed the district court in all respects.

Thereafter, the Commonwealth sought certiorari on two issues, essentially paralleling the second and third questions presented by this petition. *See Petition for Certiorari, Face v. National Home Equity Mortgage Ass'n*, No. 01-1827 (June 6, 2002). While the Commonwealth's petition was pending, this Court decided *Gonzaga*, which significantly narrowed the scope of § 1983 claims, casting serious doubt on the holding that NHEMA's action was a § 1983 claim. This Court, recognizing that *Gonzaga* cast such doubt, granted the petition, vacated the judgment below, and remanded for further proceedings in light of *Gonzaga*. NHEMA petitioned for rehearing and argued that the law of the case doctrine precluded the court of appeals from revisiting the issue of whether the suit was a § 1983 claim. *See Petition for Rehearing, Face v. National Home Equity Mortgage Association*, No. 01-1827 (October 29, 2002). This Court denied the petition for rehearing,

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[3] The Commonwealth recognized that, under *Hutto*, the lower courts were precluded from adopting its argument that sovereign immunity barred an award of attorney's fees, but reserved the right to seek this Court's reexamination of *Hutto*. The Commonwealth took a somewhat different position with respect to *Hensley*, noting that a close reading of the facts in which that case arose may limit its lack of even-handedness to cases where individual constitutional rights are at issue.

implicitly rejecting NHEMA's position that the law of the case doctrine precluded reexamination of whether the suit was a § 1983 claim.

On remand to the Fourth Circuit, NHEMA again argued that the law of the case doctrine precluded a reexamination of the issue. Although this Court had implicitly rejected the argument, the Fourth Circuit accepted it. The Fourth Circuit declared:

> Although Virginia did, in the district court, contend that the Parity Act did not confer a right enforceable under 42 U.S.C. § 1983, the district court, applying the jurisprudence of implied rights of action, *see Gonzaga*, 122 S. Ct. at 2275-77, rejected the argument and concluded that the Parity Act did create an enforceable right. We, however, never had an opportunity to review that ruling. As we pointed out,
>
> > In appealing the district court's judgment, Virginia elected not to challenge the district court's conclusion that the Parity Act conferred a cause of action on NHEMA and its members. Rather, it limited its challenge to whether Virginia law was in conflict with the Parity Act. When we disposed of that issue in favor of NHEMA and its members, NHEMA became a prevailing party on its claims brought under the Parity Act and 42 U.S.C. § 1983.
>
> 283 F.3d at 225. Thus, we were, and still are, left with the unappealed holding of the district court that the Parity Act created a right of action and that NHEMA prevailed on its assertion of that right of action. Thus, on the issues before us, the holding of *Gonzaga* is irrelevant.

App. at 3-4 (block quotation and citations in original). In other words, the court of appeals viewed the law of the case doctrine as jurisdictional. It believed that the doctrine deprived it of the power to revisit the issue and, thus,

reinstated its previous holding. Labeling *Gonzaga* as "irrelevant," the court of appeals declined to conduct the review mandated by this Court's order.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the writ. First, the court of appeals misapplied the directions given by this Court when it acted favorably on the Commonwealth's previous petition for certiorari. Contrary to the ruling by the court of appeals, the law of the case doctrine did not preclude it from reconsidering its earlier decision in light of *Gonzaga*, especially when directed to do so by this Court. Accordingly, certiorari should be granted so that the Court may obtain compliance with its previous order. Specifically, the Court should vacate the judgment below and remand this case with an explicit directive that the court of appeals reexamine whether, in light of *Gonzaga*, the respondent's suit is a § 1983 claim. Such directive should note that the law of the case doctrine does not permit the court to avoid the question.

Second, if the Court concludes that it is inappropriate to grant, vacate, and remand, then the Court should grant review in order to revisit *Hutto*. In *Hutto*, this Court found that sovereign immunity has been abrogated for all fee awards under § 1988. However, recent sovereign immunity decisions of this Court cast serious doubt on the validity of that conclusion. Even if *Hutto* is still valid, its application should be limited to suits that seek to vindicate individual rights guaranteed by the Fourteenth Amendment. The holding should not extend to suits, such as the present case, where litigants were seeking to vindicate Congress' powers under the Commerce Clause.

Third, if this Court concludes that it is inappropriate to grant, vacate, and remand, it should grant review in order to revisit *Hensley*. In *Hensley*, this Court interpreted

§ 1988 to mean that litigants who prevailed against the States should recover attorneys' fees as a matter of course while the States that prevailed should recover in only extraordinary circumstances. However, recent decisions of this Court, which emphasize the role of the States in the preservation of our system of dual sovereignty, cast serious doubt on the correctness of that conclusion. Moreover, this Court has repeatedly held that if Congress wishes to diminish the sovereignty of the States, it must do so in clear and unambiguous language. Section 1988 does not contain explicit language stating that the States must always pay attorneys' fees.

I. THIS COURT SHOULD GRANT, VACATE, AND REMAND.

This Court should again grant the petition, vacate the judgment below, and remand with an explicit statement that the law of the case doctrine does not apply and that the court of appeals should reexamine whether, in light of *Gonzaga*, the respondent's suit was a § 1983 claim. Although this Court previously granted, vacated, and remanded with instructions to reexamine the case in light of *Gonzaga*, the Fourth Circuit concluded that the law of the case doctrine precluded it from reexamining the issue. This is simply wrong. The law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). In asserting that that it could not revisit the issue of whether NHEMA's suit is a § 1983 claim, the court of appeals made three fundamental errors.

A. The Law of the Case Doctrine Does Not Preclude the Court of Appeals from Revisiting Its Determination That Respondent's Suit Is a § 1983 Claim.

The court of appeals' conclusion that the law of the case doctrine precluded it from reexamining the issue was erroneous. It misunderstands the nature of the doctrine. As this Court has explained:

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice."

Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988) (citations omitted). In other words, the doctrine is not jurisdictional; it is merely prudential.

B. *Gonzaga* Casts Serious Doubt on the Validity of the Court of Appeals Initial Determination.

The court of appeals failed to acknowledge that this Court has rendered a decision, *Gonzaga*, which casts serious doubt on the validity of the court of appeals' first decision. Instead of being viewed as an action under § 1983, respondent's suit must be regarded as a straightforward application of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), to vindicate Congress' Article I Commerce Clause power.

Section 1983 is an empty vessel. It does not contain substantive rights, but rather is a mechanism for enforcing substantive rights conferred by the federal constitution or federal statutes. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979). Consequently,

there is a recurring issue of whether a particular constitutional provision or federal statute provides a substantive right that can be enforced through § 1983. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). Before *Gonzaga*, this Court had suggested that, if a federal statute conferred a "benefit," it could be enforced through § 1983. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990) ("Congress must have intended that the provision in question benefit the plaintiff"). Because virtually every federal statute confers some "benefit," virtually every federal statute that did not have its own private right of action could be enforced through § 1983. Consequently, the scope of § 1983 actions was quite broad.

In *Gonzaga*, the Court significantly narrowed the scope of § 1983 actions. The Court rejected the suggestion of *Wilder* that the mere conferral of a benefit was sufficient to enable a statute to be enforced through § 1983: "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga*, 536 U.S. at 283. Moreover, in determining whether an individual right exists, the Court must ask "whether or not Congress intended to confer individual rights upon a class of beneficiaries. Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, . . . " *Id.* at 285-86. After *Gonzaga*, only those constitutional provisions and federal statutes that unambiguously confer individual rights can be enforced through § 1983. *Id.* at 290 ("In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms – no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."). By repudiating the reasoning of *Wilder* and holding that only those statutes which unambiguously confer individual rights could be enforced through § 1983, *Gonzaga* cast serious doubt on

the validity of the lower court's prior determination that respondent's claim was a § 1983 action. Indeed, the court of appeals noted that the district court relied on *Wilder* when it concluded that NHEMA's suit was a § 1983 action.

The existence of a new decision that adopts a rule of law that is contrary to the original decision is precisely the type of situation in which a court should revisit a previous decision. Indeed, a failure to reconsider in light of new authority is a manifest injustice.

C. This Court Directed the Court of Appeals To Reconsider.

The decision by the court of appeals on remand was not based upon an assertion of discretion, but upon its misreading of the law of the case doctrine. Moreover, any discretion that the court of appeal might have had in the matter was foreclosed by this Court's explicit directive to reconsider.

II. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HUTTO* IN LIGHT OF ITS SOVEREIGN IMMUNITY JURISPRUDENCE.

If this Court determines that granting, vacating and remanding is inappropriate, then this Court should grant review in order to revisit *Hutto* in light of recent developments in its sovereign immunity jurisprudence. Quite simply, the conclusion in *Hutto*, that sovereign immunity does not bar a claim for attorneys' fees under § 1988, is incompatible with this Court's current jurisprudence. Review is warranted to resolve this inconsistency.

A. The *Hutto* Decision

In 1978, when *Hutto* was decided, this Court's decisions imposed few, if any, restraints on the ability of Congress to abrogate sovereign immunity. Indeed, the very

idea that Congress could abrogate sovereign immunity had been announced only two years earlier. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-52 (1976). Thus, when determining whether sovereign immunity barred an award of attorneys' fees under § 1988, this Court made only a cursory inquiry into whether there was a relationship between the statute and the substantive guarantees of the Fourteenth Amendment:

> As this Court made clear in *Fitzpatrick*, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically to restrain state action.

Hutto, 437 U.S. at 693-94 (citations omitted). This Court also noted that sovereign immunity traditionally had not applied to the payment of costs by the States. *See id.* at 695-96. Since Congress, in direct contradiction of seven hundred years of common law tradition, had redefined the term "costs" to include attorneys' fees, sovereign immunity did not bar an award of attorneys' fees. *See id.* at 693-98. In other words, this Court acquiesced, at least implicitly, in Congress' attempt to circumvent sovereign immunity by manipulating well-defined legal terms from their traditionally accepted meaning.

Justice Powell, joined by then Chief Justice Burger, Justice Stewart, and Justice Rehnquist, vigorously dissented. In a passage that foreshadowed the future direction of this Court's sovereign immunity jurisprudence, Justice Powell observed:

I cannot subscribe to Part II-B's reading of the Eleventh Amendment as permitting counsel-fee awards against the State on the authority of a statute that concededly does not effect "an express statutory waiver of the States' immunity."

Edelman v. Jordan, rejected the argument that 42 U.S.C. § 1983 "was intended to create a waiver of the State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In a § 1983 action "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, . . . and may not include a retroactive award which requires the payment of funds from the state treasury." There is no indication in the language of the Civil Rights Attorneys' Fees Awards Act of 1976 (Act), that Congress sought to overrule that holding. In this case, as in *Edelman*, "the threshold fact of congressional authorization to sue a class of defendants which *literally* includes States is wholly absent." Absent such authorization, grounded in statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation, we undermine the values of federalism served by the Eleventh Amendment by inferring from congressional silence an intent to "place new or even enormous fiscal burdens on the States."

The Court notes that the Committee Reports and the defeat of two proposed amendments indicate a purpose to authorize counsel-fee awards against the States. That evidence might provide persuasive support for a finding of "waiver" if this case involved "a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities." But in this sensitive area of

> conflicting interests of constitutional dimension, we should not permit items of legislative history to substitute for explicit statutory language. The Court should be "hesitant to presume general congressional awareness," of Eleventh Amendment consequences of a statute that does not make express provision for monetary recovery against the States.

Id. at 704-06 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part) (emphasis added) (citations and footnotes omitted).

Moreover, Justice Powell and his dissenting colleagues were skeptical of the concept, embraced by the *Hutto* majority, that Congress could avoid sovereign immunity simply by changing the traditional term "costs." Justice Powell observed:

> I am unwilling to ignore otherwise applicable principles simply because the statute in question imposes substantial monetary liability as an element of "costs." Counsel fees traditionally have not been part of the routine litigation expenses assessed against parties in American courts. Quite unlike those routine expenses, an award of counsel fees may involve substantial sums and is not a charge intimately related to the mechanics of the litigation. I therefore cannot accept the Court's assumption that counsel-fee awards are part of "the ordinary discipline of the courtroom."
>
> Moreover, counsel-fee awards cannot be viewed as having the kind of "ancillary effect on the state treasury," that avoids the need for an explicit waiver of Eleventh Amendment protections. As with damages and restitutory relief, an award of counsel fees could impose a substantial burden on the State to make unbudgeted disbursements to satisfy an obligation stemming from past (as opposed to post-litigation) activities. It stretches the rationale of *Edelman* beyond recognition to characterize such awards as "the

> necessary result of compliance with decrees which by their terms [are] prospective in nature." In the case of a purely prospective decree, budgeting can take account of the expenditures entailed in compliance, and the State retains some flexibility in implementing the decree, which may reduce the impact on the state fisc. In some situations fiscal considerations may induce the State to curtail the activity triggering the constitutional obligation. Here, in contrast, the State must satisfy a potentially substantial liability without the measure of flexibility that would be available with respect to prospective relief.

Id. at 707-08 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part) (citations and footnotes omitted). In sum, sovereign immunity may not be avoided simply by semantics.

B. Post-*Hutto* Developments

In the years since *Hutto*, this Court has revitalized the original meaning of sovereign immunity. *See Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 760-61 (2002). It has done so in three ways: (1) by insisting that application of sovereign immunity must turn on the state of the law at the time of the Constitution's adoption; (2) by imposing a strict standard for congressional abrogation of sovereign immunity; and (3) by disapproving legislative attempts to circumvent sovereign immunity. These three developments, both individually and collectively, cast serious doubt on the continued validity of *Hutto*.

1. Views of the Framers

This Court has recognized that sovereign immunity is far broader than the text of the Eleventh Amendment. *See Alden v. Maine,* 527 U.S. 706, 730 (1999). It bars all "proceedings from which the Framers would have thought

the States possessed immunity when they agreed to enter the Union." *Federal Maritime Comm'n*, 535 U.S. at 756. Thus, in determining whether sovereign immunity bars an award of attorneys' fees against the States under § 1988, this Court must ask whether, in 1788, a party who obtained injunctive relief against a state officer in federal court would be able to recover attorneys' fees against the State treasury.

It is unlikely that the Framers would have thought the States were liable for attorneys' fees.[4] Although the English Parliament and the colonial legislatures occasionally passed statutes that authorized courts to impose attorneys' fee liability on *common* litigants as part of costs and although Congress enacted similar measures at various times, *see Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 249-50 (1975), such liability did not extend to *sovereigns*. There is a fundamental distinction between a common litigant, such as a private party or a corporation or even a local governmental entity, and a *sovereign*, such as the Crown, the United States, or one of the States. Indeed, this Court has repeatedly recognized that, under basic principles of federalism, statutes that are applicable to common litigants are not applicable to the States. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543-44 (2002) (federal law which tolls statute of limitations on state law claims in federal court was inapplicable to the States); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (The False Claims Act is inapplicable to the States);

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[4] While English common law apparently allowed injunctive relief against governmental officers at the time of the Revolution, *see* William Blackstone, *Commentaries On The Laws Of England* 237 (photo reprint. 1979) (1768), it is doubtful that one can find persuasive authority for the recovery of attorneys' fees against the public treasury in such a situation.

Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989) (States may not be subjected to 42 U.S.C. § 1983 claims for damages). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (explicitly declining to rule on the issue of whether there is a private right of action to enforce Title VI against States).

Moreover, the States historically were not subject to liability for attorneys' fees in the federal courts for the simple reason that the States historically were not subject to the jurisdiction of the federal courts.[5] *See Federal Maritime Comm'n*, 122 S. Ct. at 1870-71. *See also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857 (1824) (holding that sovereign immunity barred a suit against the States). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden v. Maine*, 527 U.S. 706, 748 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). This was true even if a state officer, rather than the State itself was named. *See Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 122-23 (1828). Indeed, it was not until 1908 that this Court firmly established jurisdiction to enjoin state officers who were violating federal law, *see Ex Parte Young*, and it was not until 1976 that this Court

[5] There may have been an exception for original jurisdiction actions filed by one State against another in the Supreme Court pursuant to Article III, § 2 of the Constitution. In such cases, the sovereign immunity of one litigant is counter-balanced by the sovereign immunity of the other, so that special rules may apply. In any event, the requirement that States reimburse the tribunal for the costs of litigation is fundamentally different from paying the legal fees of a private litigant.

recognized a congressional power to abrogate sovereign immunity. *See Fitzpatrick*.

This Court should revisit *Hutto* because it is inconsistent with the Framers' understanding of sovereign immunity.

2. Strict Standards for Congressional Abrogation

In recent years, this Court has imposed strict standards for the congressional abrogation of sovereign immunity. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996). If Congress has expressed its intent to abrogate sovereign immunity, the validity of the abrogation turns on the application of the "congruence and proportionality" test set forth in *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The "congruence and proportionality" test involves three questions. *See generally Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365-74 (2001). First, this Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, once this Court has "determined the metes and bounds of the constitutional right in question," it will examine "whether Congress identified a history and pattern of unconstitutional ... discrimination by the States.... " *Garrett*, at 368. In assessing whether Congress has identified unconstitutional conduct, courts look at judicial opinions, not the pronouncements of Congress. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); *Flores*, 521 U.S. at 519. Third, if a pattern of constitutional violations by the States is identified, this Court determines whether the abrogation of sovereign immunity constitutes a proportionate response to the constitutional violations. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 646 (1999).

This standard is extraordinarily difficult to meet. Indeed, since this Court adopted this stringent standard, all congressional attempts at abrogation, save one, have been invalidated. *See Garrett*, 531 U.S. at 373-74 (Title I of the Americans with Disabilities Act); *Kimel*, 528 U.S. at 89-92 (Age Discrimination in Employment Act); *Florida Prepaid*, 527 U.S. at 646-48 (Patent and Plant Variety Protection Remedy Clarification Act); *Seminole Tribe*, 517 U.S. at 75-76 (Indian Gaming Act). Moreover, the one case where the attempt at abrogation was upheld, *Nevada Department of Human Resources v. Hibbs*, 2003 WL 21210426, involved: (1) a classification which was subject to heightened scrutiny; and (2) a narrow statute confined to a discrete activity.

This Court has never addressed the issue of whether sovereign immunity has been abrogated for § 1988 under the new, stringent standard. But it is unlikely this standard has been met. As an initial matter, there is no expression of congressional intent to abrogate. Moreover, even if there were, it seems unlikely that Congress has demonstrated a pattern of constitutional violations by the States or that it can demonstrate that abrogation of immunity for attorneys' fees awards is a proportionate response. This Court should revisit *Hutto* because there are serious doubts that § 1988 can meet this new stringent abrogation standard.

3. Circumvention of Sovereign Immunity

This Court has expressed disapproval of Congress' attempts to circumvent sovereign immunity by engaging in semantics. This Court observed:

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would

> also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin. . . . *There is little more than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising in interstate commerce of its prepaid tuition program, and saying the same thing but adding at the end "if Florida chooses to engage in such advertising."*

College Savings Bank, 527 U.S. at 683-84 (emphasis added) (citations omitted). In other words, "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Kimel*, 528 U.S. at 80. Consequently, Congress cannot circumvent sovereign immunity and indirectly undermine *Seminole Tribe*, *Florida Prepaid*, *Kimel*, and *Garrett* by verbal manipulations, such as redefining "costs" to include attorneys' fees. This Court should revisit *Hutto* because it permitted the circumvention of sovereign immunity by no more than verbal manipulations.

C. *Hutto* Should Be Limited to Cases Vindicating Individual Rights Guaranteed By The Fourteenth Amendment.

Even if this Court concludes that its recent decisions do not require it to overrule *Hutto*, it should still limit the applicability of *Hutto* to those cases vindicating individual rights guaranteed by the Fourteenth Amendment. Where, as here, the suit seeks to vindicate Congress' Article I powers, sovereign immunity should bar an award of attorneys' fees.

This Court recently suggested that the standard for abrogation of sovereign immunity was lower where the classification at issue required heightened scrutiny rather than mere rational basis review. *Hibbs*, 2003 WL 21210426 at *7. In other words, whether a suit is barred by sovereign immunity may well depend upon the nature of the constitutional values being vindicated. Suits that allege race or gender discrimination or which seek to enforce fundamental rights protected by the Bill of Rights are less likely to be barred by sovereign immunity than those suits subject to rational basis analysis or that seek to enforce Congress' Article I powers. A similar distinction should apply to the issue of whether sovereign immunity bars an award of attorneys' fees. When the suit vindicates individual rights guaranteed by the Fourteenth Amendment, then the argument that sovereign immunity is inapplicable is substantial. In contrast, when the suit simply vindicates Congress' Article I powers, then there is little reason why sovereign immunity should not bar the action.

Such a distinction would be controlling in this case. NHEMA is not an individual who has been victimized by governmental discrimination or whose fundamental rights have been abridged. NHEMA is a collection of corporations that challenged the validity of a state consumer protection statute on the theory that a federal statute preempted the state statute. Forcing the taxpayers of the Commonwealth to pay attorneys' fees is inappropriate.

III. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HENSLEY* IN LIGHT OF ITS DUAL SOVEREIGNTY JURISPRUDENCE.

If this Court concludes that it is inappropriate to grant, vacate and remand, it should grant review in order to revisit *Hensley* – as it applies to the States – in light

of recent developments in its dual sovereignty jurisprudence. The conclusion in *Hensley*, that the proper interpretation of § 1988 is to award fees against losing States as a matter of course, but rarely to award fees against losing plaintiffs, is incompatible with this Court's more recent pronouncements on the role of the States in our constitutional system. In our system of dual sovereignty, there are certain structural safeguards that preclude the institutions of the national sovereign, including the federal courts, from diminishing the sovereignty of the States. Yet, *Hensley,* as applied to the States, does exactly that. Review is warranted to resolve this inconsistency.

A. The *Hensley* Decision

By its terms, § 1988 grants federal courts the *discretion* to award attorneys' fees to prevailing parties in certain types of litigation between private parties and governmental entities. There is nothing in the statute that mandates that the prevailing party should recover attorneys' fees as a matter of course. Certainly, there is nothing that states or even implies that private parties who prevail will almost certainly recover fees while the States will almost never recover. Because this Court "will not presume that the statute means what it neither says nor implies," *Verizon Maryland, Inc. v. Public Service Comm'n*, 535 U.S. 635, 644 (2002), the obvious and logical interpretation of § 1988 is that it grants courts the discretion to award fees to prevailing parties and does not discriminate between prevailing plaintiffs and prevailing States.

Although this is the most compelling interpretation of the plain words of § 1988, this Court, in *Hensley*, adopted an interpretation of § 1988 whereby private parties who prevail recover fees as a matter of course, while the State that prevails recovers fees only in those rare instances where the plaintiffs' claims are frivolous. Although such an

interpretation is at odds with the clear language of the statute and fundamentally alters the federal-state relationship, this Court's analysis was surprisingly sparse. The *sole* basis for this Court's conclusion that, under § 1988, prevailing plaintiffs should routinely recover attorneys' fees from the States, while prevailing States would almost never recover fees from the plaintiffs, was a series of statements made in congressional committee reports.[6] *Hensley*, 461 U.S. at 429. On that frail reed, this Court adopted an interpretation of § 1988 that fundamentally disadvantages the States.[7]

While this reliance on congressional committee reports *may* have resulted in an interpretation consistent with the concerns of those who sponsored the legislation, such reliance ignores the rule that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). *See also Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845).

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[6] While the Court also cited *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), that case dealt with Title VII, a fee statute not within the coverage of § 1988.

[7] Moreover, to the extent this Court wishes to rely on committee reports rather than the text of the statute, the committee reports surrounding the adoption of § 1988 do not conflict with the Commonwealth's position. To illustrate, the House Committee Report makes it clear that the primary focus of § 1988 was "civil rights litigants" – that is, individuals claming race or gender discrimination or the abridgement of individual rights specifically conferred by the Constitution. *See* H.R. Rep. No. 94-1559, p. 1-5 (1976). Interpreting § 1988 asymmetrically, so as to benefit civil rights litigants at the expense of States, does not mean that an asymmetrical reading was also contemplated in cases that did not involve individual rights protected by the Fourteenth Amendment.

This Court's deviation from the rule that the actual text of the statute must control the interpretation of the statute is, by itself, sufficient reason to revisit *Hensley*. However, there is a more compelling reason for doing so.

B. Revival of Dual Sovereignty

The more compelling reason to revisit *Hensley* centers on this Court's post-*Hensley* recognition that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n*, 535 U.S. at 751. "[T]he Constitution protects us from our own best intentions: *It divides power among sovereigns* and among branches of government, precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992) (emphasis added). Although the States surrendered many of their sovereign powers to the new national government, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

The principle that the Constitution divides power between *dual sovereigns*, the States and the national government, is reflected throughout the Constitution's text, particularly in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. *See Printz v. United States*, 521 U.S. 892, 919 (1997). "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" to be disregarded. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring). Therefore, this Court has developed certain rules to preserve the delicate equilibrium that is dual sovereignty.

1. Clear Statement Rule

This Court requires that "if Congress intends to alter the usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65 (internal quotation marks omitted). *See also Gregory*, 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (clear statement required to impose conditions on the receipt of federal funds). As this Court recently observed:

> [T]he clear statement principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Raygor, 534 U.S. at 543 (citations omitted) (federal law tolling statute of limitations for state law claims brought in federal court is inapplicable when a State is the defendant). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

Under the Clear Statement Rule, if Congress wished to enact a statutory scheme whereby States were required to routinely pay attorneys' fees to prevailing plaintiffs but rarely allowed to recover fees when the States prevailed, such an arrangement would have to be clearly and unambiguously stated in the statutory text. The actual words of § 1988, rather than a committee report read by a few members of Congress, must state that Congress intended

for the States almost always to pay attorneys' fees. Obviously, the text of § 1988 contains no such provision. Indeed, as Justice Powell and his dissenting colleagues in *Hutto* noted, § 1988 does not even contain a statement mandating that the States will be liable for attorneys' fees. *See Hutto*, 437 U.S. at 704-06. In short, the Clear Statement Rule precludes *Hensley's* asymmetrical interpretation of § 1988 from being applied against the States.

2. Dual Sovereignty Prohibits the Courts From Discriminating Against the States as a Class.

Even if the States are going to be liable for attorneys' fees, on the theory they are "costs," the fees must be awarded according to the same basic principles that traditionally guided the award of other costs. Those principles included an even-handedness that is absent from § 1988 under *Hensley* as applied by the court of appeals.

To illustrate, in the pre-*Hutto* case of *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 70 (1927), this Court held that sovereign immunity is not a defense when assessing "costs," a concept that the Court did not then construe to include attorneys' fees. The Court reasoned that a federal court's interest in expeditious, orderly proceedings "justifies [the court] in treating the state *just as any other litigant* and in imposing costs upon it." *Id.* at 77 (emphasis added). Thus, the Court implicitly recognized that the traditional approach to awarding costs was even-handed. States entered into litigation bearing the same risk of costs as their adversaries. For both parties, a loss meant exposure to an award of costs; a win meant an opportunity to collect costs.

By contrast, under § 1988, States now enter into litigation with the virtual certainty that they will have to pay fees if they lose, but will be unable to collect them if they win. Even if an award of fees is in keeping with the tradition of awarding costs, the bias against States is not. Dual sovereignty protects States against such discrimination.

In *Hutto*, the Court's rationale for permitting an award of attorneys' fees against States, despite sovereign immunity, was that losing litigants – be they plaintiffs or defendants – traditionally have been called upon to pay the "costs" of litigation. 437 U.S. at 695-96. The Court expressly linked Congressional power to expand the definition of costs to even-handedness of treatment: "*Just as* a federal court may treat a State *like any other litigant* when it assesses costs, so also may Congress amend its definition of taxable costs. . . . " 437 U.S. at 696 (emphasis added). But, after *Hensley*, federal courts no longer treated States "like any other litigant." Instead, they began to subject States to a rule far less favorable than the one applied to their litigation adversaries. Where an award of attorneys' fees does not comply with the even-handedness that has traditionally characterized exposure for costs, such an award cannot be justified by likening fees to the traditional concept of costs. Thus, reading § 1988 asymmetrically ignores (or disregards) sovereign immunity in violation of the Constitution.

C. *Hensley* Should Be Limited to Cases Vindicating Individual Rights Guaranteed by the Fourteenth Amendment.

Even if this Court concludes that its recent dual sovereignty decisions do not require it to overrule *Hensley*, it should at least limit the applicability of *Hensley* to those cases that vindicate individual rights guaranteed by the Fourteenth Amendment. Where, as here, the suit seeks to

vindicate Congress' Article I powers, the States should be treated just like any other litigants.

As explained above, there is a fundamental distinction between suits that seek to vindicate paramount constitutional values, such as the prohibition on gender and racial discrimination or fundamental rights guaranteed by the Bill of Rights, and those suits that merely seek to enforce Congress' Article I powers. When Congress enacted § 1988 in 1976, it was seeking to insure that the poor would be able to enforce the Constitution's paramount values; it was not seeking to help corporate trade groups invalidate the States' consumer protection legislation on a theory of federal preemption or conflict with the Commerce Clause. Indeed, the House Judiciary Committee's report on the legislation that became § 1988 emphasized the need to enforce the laws forbidding racial and gender discrimination. *See* H.R. Rep. No. 94-1558 at 4-5 (1976). It did not mention suits, such as the present suit, alleging that a State law has been preempted. Thus, while it might be appropriate to discriminate against the States when paramount constitutional values are at issue, it is assuredly inappropriate to do so when the dispute is over federal preemption or the Commerce Clause. *Hensley* should be so limited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 9, 2003

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff-Appellee,

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Defendants-Appellants,

MARK L. EARLEY,

Movant.

No. 01-1631

On Remand from the United States Supreme Court.
(S. Ct. No. 01-1827)

Decided on Remand: March 10, 2003

Before NIEMEYER, LUTTIG, and KING,
Circuit Judges.

Affirmed by published per curiam opinion.

COUNSEL

Jerry W. Kilgore, Attorney General of Virginia, William H. Hurd, State Solicitor, Judith Williams Jagdmann, Deputy Attorney General, Maureen Riley Matsen, Deputy State Solicitor, William E. Thro, Deputy State Solicitor, Gregory E. Lucyk, Senior Assistant Attorney General, A. Ann Berkebile, Assistant Attorney General, Christy A. McCormick, Assistant Attorney General, Richmond, Virginia, for Appellants. E. Duncan Getchell, Jr., Robert L. Hodges, William H. Baxter, II, MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Appellee.

OPINION

PER CURIAM:

This case is on remand from the United States Supreme Court for "further consideration in light of *Gonzaga University v. Doe*, 536 U.S. [273], 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)." *Face v. Nat'l Home Equity Mortgage Ass'n*, 123 S. Ct. 69 (2002). After careful reconsideration and for the reasons that follow, we respectfully adhere to our decision in *National Home Equity Mortgage Association v. Face*, 283 F.3d 220 (4th Cir. 2002), which we now readopt.

In *National Home Equity Mortgage Association*, we affirmed the district court's award to the National Home Equity Mortgage Association ("NHEMA") of $79,750 for attorneys fees, costs, and expenses as the prevailing party under 42 U.S.C. § 1988. We rejected Virginia's arguments (1) that sovereign immunity precludes an award of attorneys fees when no violation of the Fourteenth Amendment has been alleged; (2) that sovereign immunity bars an award of attorneys fees against State officers because the

standard for awarding attorneys fees favors private plaintiffs and discriminates against States; (3) that NHEMA was not a prevailing party on a claim brought under 42 U.S.C. § 1983 because the Supremacy Clause is not a source of substantive individual rights and we never concluded that NHEMA had a private right of action under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801 *et seq.* (the "Parity Act"); and (4) that special circumstances were presented in this case that would render the award unjust. Only the third reason colorably implicates the Supreme Court's holding in *Gonzaga*.

In *Gonzaga*, the Supreme Court considered whether the Family Educational Rights and Privacy Act of 1974 created a personal right that plaintiffs could enforce under 42 U.S.C. § 1983. Concluding that the Act conferred no specific individual right enforceable under § 1983, the Court observed that the Family Educational Rights and Privacy Act did not have the "rights-creating" language that is "critical to showing the requisite congressional intent to create new rights" and therefore the individual plaintiffs had no rights to enforce under § 1983. 122 S. Ct. at 2277.

Although Virginia did, in the district court, contend that the Parity Act did not confer a right enforceable under 42 U.S.C. § 1983, the district court, applying the jurisprudence of implied rights of action, *see Gonzaga*, 122 S. Ct. at 2275-77, rejected the argument and concluded that the Parity Act did create an enforceable right. We, however, never had an opportunity to review that ruling. As we pointed out,

> In appealing the district court's judgment, Virginia elected not to challenge the district court's conclusion that the Parity Act conferred a cause of action on NHEMA and its members. Rather, it limited its challenge to whether Virginia law was in conflict with the Parity Act. When we disposed of that issue in favor of NHEMA and its members, NHEMA became a prevailing party on its claims brought under the Parity Act and 42 U.S.C. § 1983.

283 F.3d at 225. Thus, we were, and still are, left with the unappealed holding of the district court that the Parity Act created a right of action and that NHEMA prevailed on its assertion of that right of action. Thus, on the issue before us, the holding of *Gonzaga* is irrelevant.

On reconsideration from the Supreme Court, we therefore respectfully adhere to our earlier decision in *National Home Equity Mortgage Association v. Face*, 283 F.3d 220 (4th Cir. 2002), and for the reasons given in that decision, we affirm the order of the district court awarding NHEMA attorneys fees, costs, and expenses in the amount of $79,750.

AFFIRMED ON RECONSIDERATION

123 S. Ct. 651; 154 L. Ed. 2d 557;
2002 U.S. LEXIS 9025; 71 U.S.L.W. 3389

E. JOSEPH FACE, JR., VIRGINIA COMMISSIONER OF FINANCE INSTITUTIONS v. **NATIONAL HOME EQUITY MORTGAGE ASSOCIATION**

01-1827

SUPREME COURT OF THE UNITED STATES

December 2, 2002, Decided

PRIOR HISTORY: *Face v. Nat'l Home Equity Mortg. Ass'n*, 154 L. Ed. 2d 3, 123 S. Ct. 69 (U.S. 2002).

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The petition for rehearing is denied.

123 S. Ct. 69; 154 L. Ed. 2d 3

E. JOSEPH FACE, JR., VIRGINIA COMMISSIONER OF FINANCE INSTITUTIONS, ET AL. v. NATIONAL HOME EQUITY MORTGAGE ASSOCIATION

01-1827

SUPREME COURT OF THE UNITED STATES

October 7, 2002, Decided

SUBSEQUENT HISTORY:

Rehearing denied by *Face v. Nat'l Home Equity Mortg. Ass'n*, 154 L. Ed. 2d 557, 123 S. Ct. 651, 2002 U.S. LEXIS 9025 (U.S., 2002)

PRIOR HISTORY:

Nat'l Home Equity Mortg. Ass'n v. Face, 283 F.3d 220, 2002 U.S. App. LEXIS 3680 (4th Cir. Va., 2002)

JUDGES:

Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Gonzaga University v. Doe*, 536 U.S. ___, 153 L. Ed. 2d 309, 122 S. Ct. 2268 (2002).

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

National Home Equity Mortgage Association,

Plaintiff-Appellee,

v.

E. Joseph Face, Jr., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Defendants-Appellants,

and

Mark L. Earley,

Movant.

No. 01-1631

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-99-398-3)

Argued: January 25, 2002

Decided: March 8, 2002

Before NIEMEYER, LUTTIG, and KING, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Luttig and Judge King joined.

COUNSEL

ARGUED: William Henry Hurd, Solicitor General, Richmond, Virginia, for Appellants. Earle Duncan Getchell, Jr., MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Appellee. **ON BRIEF:** Randolph A. Beales, Attorney General of Virginia, Judith Williams Jagdmann, Deputy Attorney General, Gregory E. Lucyk, Senior Assistant Attorney General, A. Ann Berkebile, Assistant Attorney General, Richmond, Virginia, for Appellants. Robert L. Hodges, William H. Baxter, II, MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

On the petition of the National Home Equity Mortgage Association ("NHEMA") for attorneys fees, costs, and expenses under 42 U.S.C. § 1988, the district court awarded NHEMA $79,750. On appeal, officials of the Commonwealth of Virginia contend that the award is barred by principles of sovereign immunity and is improper because NHEMA did not prevail on a claim based on a right secured by federal law so as to be enforceable under 42 U.S.C. § 1983. Alternatively, they argue that special circumstances make an award of attorneys fees in this case unjust. For the reasons that follow, we reject these arguments and affirm.

I

NHEMA commenced this action in June 1999 to obtain declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, against Virginia officials ("Virginia") who

were, under color of State law, allegedly depriving NHEMA members of their federal rights under the Alterative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801 *et seq.* (the "Parity Act"). In its complaint, NHEMA alleged that each of its members has, pursuant to the Parity Act, "federal rights to charge prepayment penalties for every alternative mortgage transaction made, purchased, or enforced in the Commonwealth of Virginia without regard to state law" and that Virginia officials were "currently directing and authorizing the Bureau [of Financial Institutions] to enforce or threaten to enforce all of these punitive measures [under Virginia law] against NHEMA members who are lawfully invoking their federal rights to charge prepayment penalties under the Parity Act." It also alleged that "[t]he Parity Act creates immediately enforceable rights under 42 U.S.C. § 1983 and Congress has not foreclosed the enforcement of these rights through a civil action filed under 42 U.S.C. § 1983." Finally, NHEMA alleged that, under the Supremacy Clause, the Parity Act preempted Virginia law prohibiting prepayment penalties. NHEMA requested a declaratory judgment that the Virginia officials' actions were "depriving NHEMA members of their federal rights under color of state law," an appropriate injunction, and attorneys fees pursuant to 42 U.S.C. § 1988.

In its responses to NHEMA's complaint, Virginia took the position that NHEMA members did not have a cause of action under the Parity Act and that, in any event, the Parity Act did not preempt State regulations that prohibited prepayment penalties. In a memorandum in support of summary judgment, Virginia stated with respect to NHEMA's rights under the Parity Act, "The issue is thus whether the Parity Act implicitly created a private right of

enforcement under § 1983 to bar States from regulating prepayment penalties . . . . Nothing in the statute purports to create a federal right not to be regulated by States in the area of prepayment penalties." On the preemption issue, the State took the position that "[n]othing in the Parity Act, either expressly or in its structure and purpose, indicates that Congress intended to preempt state prepayment penalty laws."

On cross-motions for summary judgment, the district court granted summary judgment to NHEMA and permanently enjoined Virginia from enforcing its punitive measures, based on State law, against NHEMA members who were charging prepayment penalties as allowed under the Parity Act. In its memorandum opinion, the district court, applying the standard set forth in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990), concluded that Congress had not foreclosed private enforcement of the rights created by the Parity Act and, therefore, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983." The court also held that "state regulation of prepayment penalties [is] preempted by the Parity Act" and, therefore, "sections 6.1-330.83 and 6.1-330.85 of the Code of Virginia [are] preempted by the Parity Act."

In its initial appeal to this court, Virginia did not challenge the district court's conclusion that the Parity Act created federally enforceable rights. It raised only one issue, "Whether the district court erred in ruling that the [Parity Act] and the 1996 actions of the Office of Thrift Supervision preempt §§ 6.1-330.83 and 6.1-330.85 of the Code of Virginia . . . which prescribes limits on prepayment penalties." Addressing only that issue, a unanimous panel of this court rejected the appeal and affirmed the

district court's judgment. *Nat'l Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633 (4th Cir. 2001).

After prevailing on its appeal, NHEMA filed a motion for attorneys fees, costs and expenses under 42 U.S.C. § 1988. While Virginia stipulated that $79,750 would be an appropriate amount for an award of attorneys fees, costs and expenses in this case, it opposed any award based on its constitutional sovereign immunity arguments and on its argument that the district court's preemption ruling did not involve a claim under 42 U.S.C. § 1983 because the Supremacy Clause was not a source of substantive rights enforceable under § 1983. By order dated April 5, 2001, the district court rejected Virginia's defenses and, pursuant to 42 U.S.C. § 1988, awarded NHEMA $79,750 in attorneys fees, costs and expenses. The court reasoned that its earlier ruling that NHEMA had federally enforceable rights under the Parity Act went unchallenged on appeal and concluded that NHEMA prevailed on the assertion of those rights. The court observed that when Virginia elected not to appeal its ruling on NHEMA's rights under the Parity Act, that ruling "became the law of the case and [became] binding on these proceedings." From the district court's order awarding NHEMA attorneys fees, costs, and expenses, Virginia filed this appeal.

II

Virginia contends first that sovereign immunity precludes an award of attorneys fees against State officers when no violation of the Fourteenth Amendment has been alleged. It argues that, in light of recent Supreme Court jurisprudence, such as *Seminole Tribe v. Florida*, 517 U.S.

44 (1996), the authority of district courts to award attorneys fees against State actors should be reexamined.

But as Virginia recognizes, this argument is squarely at odds with Supreme Court cases allowing awards of attorneys fees against State actors. *See Hutto v. Finney*, 437 U.S. 678, 695 (1978) (holding that because attorneys fees have traditionally been regarded as costs, which have long been awardable against a State, they may be awarded against a State "without regard for the states' Eleventh Amendment immunity"); *Missouri v. Jenkins*, 491 U.S. 274, 279-80 (1989) (reaffirming the holding in *Hutto* and clarifying that an application of § 1988 to the States does not require congressional abrogation of sovereign immunity). Because we lack authority to reconsider the Supreme Court's jurisprudence, we reject Virginia's argument. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

III

Virginia next contends that sovereign immunity bars an award of attorneys fees against State officers because the standard used in determining whether to award attorneys fees in a particular case favors private plaintiffs and, therefore, discriminates against the States. Virginia contends that "[c]oncepts of federalism demand that a prevailing plaintiff, such as NHEMA, must be placed on

the same footing which the Supreme Court has established for prevailing State defendants. Thus, attorney's fees should not be awarded absent a showing that a party's position was frivolous, unreasonable, and without foundation."

Again, this argument is at odds with existing Supreme Court precedent. Under current law, a court may award attorneys fees to prevailing *plaintiffs* as a matter of course, but to prevailing *defendants* only if "the plaintiff's action was frivolous, unreasonable, or without foundation." *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (citation and internal quotation marks omitted); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (stating that "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (citation and internal quotation marks omitted)). The Supreme Court has established this differential standard, and, again, we lack the authority to change it.

IV

For its principal argument on appeal, Virginia contends that NHEMA was not a prevailing party on a claim brought pursuant to 42 U.S.C. § 1983 and, therefore, is precluded from recovering attorneys fees under 42 U.S.C. § 1988. It argues that, because our first opinion in this case focused exclusively on preemption and the Supremacy Clause, NHEMA did not prevail under § 1983 because the Supremacy Clause is not a source of substantive individual rights supporting a § 1983 action. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (noting that the Supremacy Clause is not "a source

of any federal rights" and, therefore, "of its own force, does not create rights enforceable under § 1983" (citation and internal quotation marks omitted)); *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 884 F.2d 160, 163 (4th Cir. 1989) (per curiam) ("We hold that federal preemption of local ordinances pursuant to the Supremacy Clause is not actionable under Section 1983. Therefore, there can be no award of attorney's fees under Section 1988").

This argument, however, overlooks the nature of NHEMA's complaint, the issues decided by the district court, and the limited review that we conducted in our earlier opinion. NHEMA brought its action under 42 U.S.C. § 1983 explicitly to vindicate rights it asserted were conferred on its members by the Parity Act, a federal statute. It alleged in its complaint that it had rights conferred by the Parity Act and that it was seeking to vindicate those rights in the face of conflicting State law. While NHEMA did assert that the rights created by the Parity Act trumped State law under the Supremacy Clause, its requested relief was to enforce its federal rights under the Parity Act despite conflicting State law. Thus, NHEMA sought to secure a federal right under § 1983.

When the parties filed cross-motions for summary judgment, they explicitly addressed whether the Parity Act conferred enforceable rights on NHEMA and its members. Virginia argued vigorously that no such rights were created, but NHEMA prevailed on that issue when the district court concluded, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983," applying the three part test in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990). The district court reasoned that the test in *Wilder* was satisfied because "(1) nonfederally chartered housing creditors belonging to NHEMA are

intended beneficiaries of the Parity Act, (2) the Parity Act creates a present right to be free of state law, and (3) the judicial remedies being sought are traditional and well established." In addition to concluding that the Parity Act provided NHEMA and its members with rights enforceable under 42 U.S.C. § 1983, the court concluded that the provisions of the Parity Act creating those federal rights preempted Virginia's conflicting statutes – §§ 6.1-330.83 and 6.1-330.85 of the Virginia Code.

In appealing the district court's judgment, Virginia elected not to challenge the district court's conclusion that the Parity Act conferred a cause of action on NHEMA and its members. Rather, it limited its challenge to whether Virginia law was in conflict with the Parity Act. When we disposed of that issue in favor of NHEMA and its members, NHEMA became a prevailing party on its claims brought under the Parity Act and 42 U.S.C. § 1983.

While Virginia suggests by implication that perhaps we should now review the question of whether the Parity Act conferred rights on NHEMA, "[i]t is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (citations and internal quotation marks omitted). Accepting as the law of the case the conclusions that NHEMA has a federally enforceable right under the Parity Act – a conclusion that we do not review – and that NHEMA sought to enforce that right, we find that this case does not fall within the rule announced in *Golden State Transit* and *Maryland Pest Control*. In *Golden State Transit*, the Supreme Court ultimately concluded that the National Labor Relations Act created a

right to prevent State governmental interference with federally protected labor rights and that therefore 42 U.S.C. §1983 could be employed to enforce that right. 493 U.S. at 108-09. In *Maryland Pest Control*, we concluded that the plaintiff did not have a substantive right secured by a federal statute, determining instead that the case involved a pure Supremacy Clause issue, and that therefore no 42 U.S.C. § 1983 claim could be asserted. *Maryland Pest Control*, 884 F.2d at 163. In the circumstances before us, however, once the district court found that NHEMA had a federally enforceable right under the Parity Act, it correctly determined that NHEMA prevailed on that right through a § 1983 claim and therefore was justified in relying on § 1988 for its award of attorneys fees, costs, and expenses.

V

Finally, Virginia argues that special circumstances were presented in this case that would render an award of attorneys fees to NHEMA unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (stating that a prevailing party should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (citation and internal quotation marks omitted)).

Articulating those special circumstances, Virginia asserts first that the nature of NHEMA, a nationwide trade association of mortgage lenders, was a special circumstance weighing against awarding fees because NHEMA can afford to hire its own lawyers. Second, Virginia asserts that the nature of the case, a nonconstitutional case with its own financial incentives for NHEMA, weighed against awarding fees. Third, Virginia asserts

that the nature of the defense – that "it would have been *irresponsible* for the Commonwealth to have abandoned these [Virginia] statutes enacted through the democratic process – without testing their validity through a vigorous defense in the courts" – weighed against awarding fees in this case.

Because the special circumstances exception is narrow and the special circumstances claimed here are not extraordinary, we conclude that none of them compel a finding that the district court abused its discretion by not applying the exception. *See Doe v. Board of Educ. of Baltimore County*, 165 F.3d 260, 264 (4th Cir. 1998) (recognizing that "this 'special circumstances' exception is very 'narrowly limited'" and that "[o]nly on rare occasions does a case present such circumstances").

For the foregoing reasons, the order of the district court awarding attorneys fees, costs and expenses to NHEMA in the amount of $79,750 is

AFFIRMED

JUDGMENT

FILED: March 8, 2002

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 01-1631
CA-99-398-3

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

Plaintiff – Appellee

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission

Defendants – Appellants

MARK L. EARLEY

Movant

Appeal from the United States District Court for the Eastern District of Virginia at Richmond

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 16, 2002

MANDATE

TO: Clerk, District Court/Agency

FROM: Lisa Jernigan
Deputy Clerk

RE: 01-1631 Natl Home Equity v. Face
CA-99-398-3

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 3/8/02.

[ ] Order and Certified Copy of Judgment
[X] Opinion and Certified Copy of Judgment
[X] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule R45
[ ] Other: _____
[ ] The record has been retained for use in case number _____

A copy of the judgment is enclosed to counsel/pro se parties.

cc: William Harrison Baxter II
Earle Duncan Getchell Jr.
Alice Ann Berkebile
Judith Williams Jagdmann
William Henry Hurd
Martha B. Brissette

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1631
CA-99-398-3

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

Plaintiff – Appellee

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission

Defendants – Appellants

MARK L. EARLEY

Movant

ORDER

(Filed April 16, 2002)

Appellants have filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Luttig and Judge King.

For the Court,
/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v. Civil Action Number: 3:99CV398

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission,

SUSAN E. HANCOCK,
Deputy Commissioner, Consumer Finance,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

Defendants,

MARK L. EARLEY,
Attorney General of Virginia,

Intervenor-Defendant.

MEMORANDUM OPINION

This matter is before the Court on the plaintiff's motion for attorney's fees, costs and expenses. The motion follows the Court granting the plaintiff's motion for summary judgment and denying the defendants' motions for summary judgment in a Memorandum Opinion dated September 9, 1999, which was followed by an appeal to the United States Court of Appeals for the Fourth Circuit.

The case involved the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06 ("the Parity Act"), and whether it preempted Virginia laws limiting prepayment penalties. National Home Equity Mortgage Association ("NHEMA" or "plaintiff") filed a motion for summary judgment asserting that the Parity Act preempted Virginia laws. Defendants E. Joseph Face, Jr. and Susan E. Hancock, from the Virginia State Corporation Commission ("SCC defendants") and intervenor-defendant Mark L. Earley, Attorney General of Virginia ("the Attorney General") also filed motions for summary judgment, both asserting that the Parity Act did not apply to Virginia's statutory prepayment penalty limits. The Court issued a Memorandum Opinion and Order granting the plaintiff's motion and denying the defendants' motions. *National Home Equity Mortgage Ass'n v. Face*, 64 F. Supp. 584 (E.D. Va. 1999). The defendants and the intervenor-defendant then appealed to the United States Court of Appeals for the Fourth Circuit. The matter was argued on October 30, 2000 and decided on February 7, 2001. The United States Court of Appeals affirmed the district court by published opinion. *National Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633 (4th Cir. 2001).

The parties have agreed that, if the Court grants the motion for attorney's fees, costs, and expenses, the amount to be awarded the plaintiff is $79,750.00 in attorney's fees, costs and expenses.

The plaintiff moves for attorney's fees based on 42 U.S.C. § 1988, arguing that because the Court granted its summary judgment motion, it is the prevailing party under 42 U.S.C. § 1983. Ordinarily, a prevailing party in a section 1983 action "should . . . recover an attorney's fee unless special circumstances would render such an award

unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Section 1988 states in relevant part that "[i]n any action or proceeding to enforce a provision of [§ 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

The defendants and intervenor-defendant raise several arguments that NHEMA is not entitled to attorney's fees or costs. First, they argue that *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 884 F.2d 160 (4th Cir. 1989) (per curiam), *cert. denied*, 494 U.S. 1056 (1990), mandates that the plaintiff not be awarded attorney's fees and costs. In *Maryland Pest Control*, the Fourth Circuit framed the issue as: "the question in this case is whether the Associations' successful argument, grounded in the Supremacy Clause, that FIFRA preempted local laws will support a civil rights action under Section 1983 which would entitle them to attorney's fees under Section 1988." 884 F.2d at 162. The Fourth Circuit noted that several circuits, including the Ninth, the Tenth, and the Seventh, have held that the Supremacy Clause is not a source of substantive individual rights that could support an action brought pursuant to Section 1983. *Id.* at 162-163.

However, in the present case, the Court did not hold that the Supremacy Clause created rights enforceable under section 1983. Instead, the Court applied the three-part test set forth in *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498, 509 (1990), and specifically ruled that NHEMA "has a federally enforceable right under 42 U.S.C. § 1983," the right "to be free of state law." 64 F. Supp. at 591. Therefore, the exception implied in the final paragraph of *Maryland Pest Control* – that if an action is maintainable

under section 1983 as a suit to enforce statutory rights, then there can be an award of attorney's fees under section 1988 – is applicable. An examination of the most recent cases addressing the three-part test to determine whether a statute gives rise to a federal right enforceable under section 1983 supports the Court's previous determination. *See Blessing v. Freestone*, 520 U.S. 329 (1997); *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).

In addition, this decision of the Court was not challenged on appeal by the defendants or the intervenor-defendant. The Court has reviewed the briefs the parties filed in the Fourth Circuit, as well as the opinion of the Fourth Circuit. The appellants failed to appeal the Court's ruling that NHEMA has a federally enforceable right under section 1983. Accordingly, that ruling became the law of the case and is binding in these proceedings. *See Suel v. Secretary of Health and Human Services*, 192 F.3d 981, 985-86 n.2 (Fed. Cir. 1999) ("It is particularly appropriate to invoke law of the case principles when a party has decided not to appeal an issue and further proceedings are conducted in reliance on that decision.").

Defendants and intervenor-defendant make additional arguments that the plaintiff is not entitled to attorney's fees, arguing that such an award is barred by sovereign immunity, under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and arguing that there are special circumstances in this case that render an award of attorney's fees unjust, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court disagrees with defendants' arguments, finding that they are without merit.

An appropriate Order shall issue.

DATE: April 5, 2001

/s/ Richard L. Williams
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v. Civil Action Number: 3:99CV398

E. JOSEPH FACE, JR.,
Commissioner of Financial Institutions,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

SUSAN E. HANCOCK
Deputy Commissioner, Consumer Finance,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

Defendants,

MARK L. EARLEY,
Attorney General of Virginia,

Intervenor-Defendant.

FINAL JUDGMENT ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS plaintiff's motion for attorney's fees, and expenses and hereby ENTERS JUDGMENT for the plaintiff against the defendants, Face and Hancock, in the amount of $79,750.00.

It is so ORDERED.

Let the Clerk send a copy of this Final Judgment Order and the accompanying Memorandum Opinion to all counsel of record.

DATE: April 5, 2001

/s/ Richard L. Williams
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION,

Plaintiff.

v.

E. JOSEPH FACE, JR., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 3:99CV398

____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered a verdict.

_X_ **Decision by Court.** This action came to hearing before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court GRANTS plaintiff's motion for attorney's fees, costs, and expenses and hereby ENTERS JUDGMENT for the plaintiff against the defendants, Face and Hancock, in the amount of $79,750.00.

DATE: April 5, 2001

Norman H. Meyer, Jr.
Clerk

/s/ _____
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission,

SERVE:
1300 East Main Street
Suite Eight Hundred
Post Office Box 640
Richmond, VA 23218-0640

SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

SERVE:
1300 East Main Street
Suite Eight Hundred
Post Office Box 640
Richmond, VA 23218-0640

Defendants.

Civil Action No.
399CV898

VERIFIED COMPLAINT FOR DECLARATORY RELIEF AND PRELIMINARY AND PERMANENT INJUNCTIONS FOR VIOLATION OF 42 U.S.C. § 1983

(Filed Jun. 1, 1999)

Plaintiff National Home Equity Mortgage Association ("NHEMA") states the following as its Verified Complaint against Defendants E. Joseph Face, Jr., Commissioner of Financial Institutions, Bureau of financial Institutions, Virginia State Corporation Commission, and Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission:

THE PARTIES

1. National Home Equity Mortgage Association ("NHEMA") is the largest national trade association focusing primarily upon the home equity lending market. Members of this voluntary trade association include banks, mortgage lending corporations, secured equity lenders, law firms, title insurers, consulting firms, and appraisal services corporations. NHEMA membership includes entities that are currently licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to conduct business in the Commonwealth of Virginia, and that also qualify as housing creditors under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06, (the "Parity Act") and are thus subject to its provisions.

2. E. Joseph Face, Jr., is Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission. He is responsible for the division that administers state laws regulating financial

services institutions licensed by the Bureau. He executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia.

3. Susan E. Hancock is Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission. She is responsible for the administrative section which examines and supervises the operations of financial services institutions (except for state-chartered banks and credit unions) licensed by the Bureau of Financial Institutions. She executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia.

JURISDICTION AND VENUE

4. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1331 and by 28 U.S.C. §§ 1343(3)-(4) in this suit complaining of the denial of federal rights under color of state law forbidden by 42 U.S.C. § 1983.

5. Authority to order a reasonable award of attorneys' fees and costs is conferred by 42 U.S.C. § 1988.

6. Declaratory relief is proper under 28 U.S.C. § 2201.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b).

GROUNDS FOR RELIEF

Alternative Mortgage Transactions

8. An alternative mortgage transaction describes a residential-based loan or credit sale in which the lender

may raise the interest rate, renegotiate the finance charge, or implicitly adjust the mortgage rate by allowing debt to mature faster than anticipated in the original amortization schedule. 12 U.S.C. §§ 3802(1)(A)-(B). The definition of an alternative mortgage transaction also includes the changing of any other term or variation not common to traditional fixed-rate or fixed-term transactions. 12 U.S.C. § 3802(1)(C); 12 C.F.R. § 560.2(b)(5).

9. Congress has found that such mortgages are essential in providing an adequate supply of credit secured by residential property to those demanding such credit. 12 U.S.C. § 3801(a)(2).

10. The National Credit Union Administration, Comptroller of the Currency, and Director of the Office of Thrift Supervision have all recognized the significance and value of such mortgages by adopting regulations permitting federally chartered banking institutions to enter this industry. 12 U.S.C. § 3801(a)(3).

11. Federally chartered banking institutions thus engage in direct competition with smaller state regulated establishments to make, purchase, and enforce such mortgages on the open market.

The Alternative Mortgage Transaction Parity Act of 1982

12. In the early 1980s, Congress determined that federal regulations governing such mortgages heavily favored federally chartered banking institutions. 12 U.S.C. § 3801(a)(2).

13. To eliminate this discriminatory impact, Congress enacted the Parity Act and thereby attempted to

create a level playing field for all financial services institutions that either supplied or wanted to supply such mortgages by affording housing creditors authority to make, purchase, and enforce these mortgages. 12 U.S.C. § 3801(b).

14. The Parity Act defines a housing creditor in relevant part as "any person who regularly makes loans, credit sales, or advances secured by interests in properties . . . or any transferee of them." 12 U.S.C. § 3802(2)(C)-(D).

15. The Parity Act provides that all housing creditors have general authority to make, purchase, and enforce alternative mortgage transactions in accordance with regulations issued by the Director of the Office of Thrift Supervision governing federal savings and loan associations. 12 U.S.C. § 3803(a)(3).

16. The Director of the Office of Thrift Supervision has rulemaking authority pursuant to 12 U.S.C. §§ 1463(a), 1464(a) to regulate federally chartered savings and loan organizations. The Director of the Office of Thrift Supervision has given federal savings and loan organizations federal rights to charge prepayment penalties without regard to state laws. 12 C.F.R. §§ 560.2(a), (b)(5).

Mandatory Requirements for Opting Out of The Parity Act

17. Congress expressly afforded each state the opportunity under 12 U.S.C. § 3804(a) to opt out of the preemption provisions of the Parity Act between October 15, 1982, and October 15, 1985, by enacting, or adopting by referendum or constitutional amendment, a new law, stating explicitly and by its terms that the state opting out

did not want the Parity Act to preempt state laws regarding alternative mortgage transactions.

Failure of the Commonwealth of Virginia to Opt Out Gives NHEMA Members Qualifying as Housing Creditors under the Parity Act Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions Made, Purchased, and Enforced in the Commonwealth of Virginia

18. The Commonwealth of Virginia failed to enact or adopt by referendum or constitutional amendment any such law stating explicitly and by its terms that it did not want the Parity Act to preempt Virginia laws regarding alternative mortgage transactions made, purchased, and enforced within that state.

19. Through acts that were not passed within the required time period and that do not contain any reference to the Parity Act, the Virginia General Assembly purports to limit and regulate prepayment penalties contrary to the Parity Act. 1987 Va. Acts ch. 622 (codifying Va. Code Ann. §§ 6.1-330.83, .85).

NHEMA Members Have Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions in the Commonwealth of Virginia

20. Pursuant to 12 U.S.C. § 3803(a)(3) and 12 C.F.R. §§ 560.2(a), (b)(5), every NHEMA member subject to the provisions of the Parity Act and licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, has federal rights to charge prepayment penalties for every alternative mortgage transaction made, purchased, or enforced in the Commonwealth of Virginia without

regard to state law. These federal rights preempt any limits on prepayment penalties enacted under Virginia state law. Va. Code Ann. §§ 6.1-330.83, .85.

The Bureau of Financial Institutions, Virginia State Corporation Commission, Through Defendants, is Illegally Revoking Under Color of State Law NHEMA Members' Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions

21. NHEMA members who qualify as housing creditors under the Parity Act and conduct business within the Commonwealth of Virginia are automatically licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to make, purchase, and enforce alternative mortgage transactions within the Commonwealth of Virginia. Va. Code Ann. § 6.1-410. Their rights to charge prepayment penalties in accordance with the Parity Act continue in perpetuity because the Commonwealth of Virginia never opted out of its preemption provision in the form or manner described in 12 U.S.C. § 3804(a).

22. In the April 1999 edition of the official newsletter *The Compliance Connection: Regulatory News for Virginia Mortgage and Consumer Finance Licensees,* Defendants announced or permitted to be announced that the Parity Act does not preempt Virginia laws limiting prepayment penalties for alternative mortgage transactions. This article is attached as Exhibit A.

23. In stating its policy, the Bureau of Financial Institutions, acting through or on the authority of Defendants, referred to "numerous opinion letters from attorneys, along with copies of opinions from the Office of Thrift

Supervision's counsel and various states' Attorneys General which opine that the [Parity Act] preempts Virginia law."

24. The announcement continued: "[t]he Bureau does not agree with these opinions."

25. Speaking for the Bureau of Financial Institutions, the announcement stated that the Bureau will "continue to cite [entities charging prepayment penalties in excess of state limits on alternative mortgage transactions for] violations of Virginia statutes relating to prepayment penalties." *See* Va. Code Ann. §§ 6.1-330.83, .85.

26. Speaking for the Bureau of Financial Institutions, the announcement stated that the Bureau will require such entities "to refund prepayment penalties collected, in excess of the state law limits."

27. Speaking for the Bureau of Financial Institutions, the announcement stated that such entities must notify "current borrowers so they will be aware that any higher penalty cannot be enforced." Moreover, "[a] copy of the notification must be made a part of the permanent loan file, and investors who have purchased loans providing for penalties in excess of the penalty set forth in the Virginia Code must also be notified."

28. Speaking for the Bureau of Financial Institutions, the announcement stated that exercise of the federal right to charge prepayment penalties without regard to state law subjects housing creditors to license revocation.

29. Speaking for the Bureau of Financial Institutions, the announcement stated that charging prepayment penalties in excess of state limits will cause the Bureau to refer such entities to the Office of the Attorney General for

investigation of violations of Va. Code Ann. §§ 6.1-330.83, .85 and for potential legal action pursuant to Va. Code Ann. § 6.1-430.

30. Defendants are currently directing and authorizing the Bureau to enforce or threaten to enforce all of these punitive measures against NHEMA members who are lawfully invoking their federal rights to charge prepayment penalties under the Parity Act.

31. The Supremacy Clause (U.S. Const. art. VI, § 2) guarantees that federal laws made under the authority of the United States shall prevail over contrary state laws.

32. The Parity Act creates immediately enforceable rights under 42 U.S.C. § 1983 and Congress has not foreclosed the enforcement of these rights through a civil action filed under 42 U.S.C. § 1983. These rights are substantial, and not too vague or amorphous so as to preclude judicial enforcement through 42 U.S.C. § 1983.

33. NHEMA members subject to the Parity Act have individual standing because they face real and present harm in the form of Defendants' order to notify borrowers and investors that no negotiated prepayment penalty in excess of state limits is enforceable and through the announced intention to punish entities for their past and future exercise of federal rights. NHEMA as a voluntary trade association has standing to assert these rights on behalf of its members.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. Appropriate declaratory relief that Defendants' actions are depriving NHMEA members of their federal rights under color of state law.

2. Appropriate injunctive relief requiring Defendants to immediately cease enforcement of punitive measures against NHEMA members for exercising their federal rights to charge prepayment penalties in excess of state limits on alternative mortgage transactions.

3. An award of reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

4. Such other relief as the Court may deem appropriate.

Respectfully submitted,

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

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VERIFICATION PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of June, 1999 at Washington, D.C.

/s/ [Illegible]

EXHIBIT A

The Compliance Connection

State Corporation Commission – Bureau of Financial Institutions Regulatory News for Virginia Mortgage and Consumer Finance Licensees **APRIL 1999**

Federal Preemption of Virginia's Prepayment Penalty Laws:

The major topic lately has been the debate over whether the Alternative Mortgage Transaction Parity Act (AMTPA) preempts Virginia laws that place limits on prepayment penalties. The Bureau has received numerous opinion letters from attorneys, along with copies of opinions from the Office of Thrift Supervision's counsel and various states' Attorneys General which opine that the AMTPA preempts Virginia law. The Bureau does not agree with these opinions.

We believe Congress' intention in passing the AMTPA was to authorize, in the case of "housing creditors', the OTS

to override state laws which prevented the making of mortgage loans having certain features not common to conventional mortgage loans. We understand the AMTPA gave housing creditors the right to enter into alternative mortgage loan transactions in accordance with OTS regulations only "to the extent that such regulations are authorized by rulemaking authority granted to [the OTS] . . . under laws other than this section (12 U.S.C. §3803)." The prepayment provisions of Virginia law do not prevent or impede creditors from making adjustable rate loans or other non-conventional mortgage loans (balloon, shared equity loans). They never have.

In our opinion, in §3802(1)(c) of the AMTPA, Congress explicitly restricted the OTS's authority to preemption of only such state laws as related to features " . . . not common to traditional fixed-rate, fixed-term transactions . . . " The Virginia statutes applicable to prepayment penalties, §§6.1-330.83 and 6.1-330.85 of the Code of Virginia, govern a longstanding feature of conventional mortgage lending which Congress left to state law under §501(b)(4) of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA). To express the matter more simply, our view is that federal law governs unconventional features of "alternative mortgage transactions", while state law governs conventional features of such loans, as Congress intended.

In addition, under § 501(b)(4) of DIDMCA, the states had an unlimited period of time within which to "opt out" of federal preemption of "points and other charges" connected with federally-related mortgage loans, and no particular formality was required. Virginia opted out as authorized by Congress by amendment and recodification of its money and interest laws in 1987, including

statutes related to points, late charges, prepayment penalties, etc. permitted in connection with mortgage loans. Therefore, it was unnecessary to opt out of federal preemption under AMTPA.

Bureau examiners will continue to cite violations of Virginia statutes relating to prepayment penalties. Licensees found in violation will be required to refund prepayment penalties collected, in excess of the state law limits. In addition, notification of Virginia's limit on prepayment penalties must be provided to current borrowers so they will be aware that any higher penalty cannot be enforced. A copy of the notification must be made a part of the permanent loan file, and investors who have purchased loans providing for penalties in excess of the penalty set forth in the Virginia Code must also be notified.

In addition to possible revocation of license, such violations can be referred to the Attorney General's office for investigation pursuant to Virginia Code §6.1-430.

No. 02-1810

JUL 16 2003

In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals abuse its discretion by applying the law of the case doctrine in declining to revisit the merits of the case in an appeal from the award of fees after the case on the merits was concluded?

2. Should the Court overrule its decisions in *Hutto v. Finney*, 437 U.S. 678 (1978), and *Missouri v. Jenkins*, 491 U.S. 274 (1989), and hold instead that when a plaintiff prevails in an action against state officials for injunctive and declaratory relief pursuant to 42 U.S.C. § 1983, the doctrine of sovereign immunity bars an award of attorney's fees under 42 U.S.C. S 1988?

3. Should the Court overrule its decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (construing 42 U.S.C. § 1988 to authorize awards of reasonable attorney's fees as part of costs to prevailing plaintiffs, but requiring prevailing defendants to show that the suit was frivolous or brought in bad faith), and replace that rule with an "even-handed" approach to the award of fees, even though the legislative history clearly shows that Congress intended the construction adopted by the Court?

THE PARTIES

I. The National Home Equity Mortgage Association ("NHEMA") is a national trade association focusing primarily upon the home equity lending market. Members of this voluntary trade association include banks, mortgage lending corporations, secured equity lenders, law firms, title insurers, consulting firms, and appraisal services corporations. Its membership includes entities that are licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to conduct business in the Commonwealth of Virginia, and that also qualify as housing creditors under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-3806 ("Parity Act").

E. Joseph Face, Jr. is the Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission. He is responsible for the division that administers state laws regulating financial services institutions licensed by the Bureau. He executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

Susan E. Hancock is the Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission. She is responsible for the administrative section that examines and supervises the operations of financial services institutions (except for state-chartered banks and credit unions) licensed by the Bureau. She executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, respondent National Home Equity Mortgage Association hereby discloses that it is a national trade association as noted *supra*, that it has no parent corporation, and that there is no publicly held company that owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

Respondent NHEMA departs from petitioners' Statement of the Case to the extent that they assert that NHEMA challenged the constitutionality of Va. Code §§ 6.1-330.83 and 6.1-330.85. Petition, at 4. Both statutes are constitutional exercises of the Commonwealth of Virginia's police power, when properly applied. NHEMA's suit sought, successfully, to restrain enforcement of these state statutes to invalidate home mortgage prepayment penalty provisions permitted under the federal Alternative Mortgage Transaction Parity Act, 12 U.S.C. §§ 3801-3806. The Parity Act permits lenders subject to its provisions to make, purchase, and enforce mortgages conforming to regulations issued under the Act according to the terms of the instruments. 12 U.S.C. § 3803(a)(3). The officials sued in this case in their official capacities had indicated their intention to enforce these state statutes against lenders despite the lenders' availing themselves of their federal right under preemptive effect of federal law. *See* Petition, at App. 34 – App. 36.

REASONS WHY THE WRIT SHOULD BE DENIED

Introduction and Summary of the Argument

This case comes before the Court on petition from the decision of the United States Court of Appeals for the Fourth Circuit affirming an award of attorney's fees under 42 U.S.C. § 1988. Petitioner's initial argument seeks further review of the merits in the guise of a challenge to NHEMA's prevailing party status under § 1988.

However, that argument is foreclosed because, inasmuch as petitioners failed to appeal the determination

that NHEMA had an individually enforceable right under § 1983 derived from the Parity Act, the Court of Appeals correctly applied the law of the case doctrine. The Court of Appeals also reached the correct result on the additional ground that the decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), which addressed when a right of action may arise for an implied federal right, does not even apply to this case. Here, the federal right is explicitly granted. In fact, the creation of a federal right was the central purpose of the Parity Act. *Gonzaga Univ. v. Doe* did not change the law applicable to the merits of this case, and there is no reason to revisit the merits yet again.

Petitioners next repeat the arguments urged on the Court before, that the cases of *Hutto v. Finney*, 437 U.S. 678 (1978), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), should be overruled. A correct reading of those cases and the Court's subsequent decisions refutes that contention. Unless the Court is prepared to overrule *Hutto* and *Hensley*, and the cases, myriad in number, that depend upon their reasoning, it should deny the writ in this case. Indeed, adoption of the rule argued for by petitioners would go beyond overruling *Hutto*. It would change the operation of The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("§ 1988"), fundamentally.

Petitioners claim that the Court's jurisprudence of attorney's fees under § 1988, at least as it applies to states or state officials, has been overruled by the Court's recent decisions involving the Eleventh Amendment. The petition in this case recycles several arguments that the Court has rejected over the years. Therefore, petitioners assert, a revised interpretation of § 1988 is required to avoid constitutional infirmity.

The crux of petitioners' argument is that the States' sovereign immunity protects them against an award of

attorney's fees. Petitioners claim that immunity can only be abrogated by Congress acting under its enforcement authority under § 5 of the Fourteenth Amendment, and then only for Fourteenth Amendment-based claims and only by a "clear statement" of such abrogation in the language of the statute itself.

Petitioners assert further that the States' immunity precludes Congress from treating the States less favorably than other litigants. Consequently, they assert, the rule in *Hensley v. Eckerhart*, which treats prevailing plaintiffs under § 1988 differently from prevailing defendants, cannot constitutionally be applied to States.

The petitioners' arguments do not undercut, either factually or legally, either basis of the Court's holding in *Hutto* - first, that Congress abrogated the States' Eleventh Amendment immunity in enacting § 1988, and second that States have been liable historically for awards of costs to prevailing opponents without regard to the Eleventh Amendment. *Hutto* rejected the arguments made here in 1978. *Missouri v. Jenkins* rejected the same arguments in 1989, when the petitioners there asserted that further development of the Court's Eleventh Amendment jurisprudence had changed the law. In *Missouri v. Jenkins*, 491 U.S. at 280, the Court held that the Eleventh Amendment simply did not apply to an award of attorney's fees ancillary to a grant of prospective relief.

Petitioners now ask the Court to decide that some important threshold has been passed that was not passed in 1978 or 1989. But the Court has consistently held that Congress intended to and did abrogate the States' Eleventh Amendment immunity against awards of attorney's fees under § 1988. Just as consistently, it has held that the States' historical liability for costs is an adequate basis by itself for fees to be awarded, apart from any considerations

of State immunity. After *Missouri v. Jenkins*, petitioners' arguments grounded in the Eleventh Amendment are completely misdirected.

Furthermore, because it is clear that the Eleventh Amendment has no application to the issues before the Court, petitioner's questions presented are reduced to matters of statutory construction, where considerations of stare decisis have the greatest force. The Court cannot reverse a body of law dating back to *Hutto* in 1978, and even further, without transgressing the important principles embodied in the doctrine of *stare decisis*.

The arguments that petitioners advance ought to fare no better on this occasion than when they were rejected by the Court in the past. It is beyond reasonable dispute that Congress has validly abrogated the States' immunity against awards of attorney's fees ancillary to prospective relief against state officials. It is also beyond reasonable dispute that Congress had sufficient authority to permit recovery of such fee awards as part of costs, apart from any considerations of State immunity.

Finally, petitioners' assertion that *Hensley* subjects States to a discriminatory rule is not well-taken. States are not discriminated against *qua* States because their employees acting in their official capacities are not the only state actors subject to § 1983. Many defendants subject to § 1983 and the other statutes triggering liability under § 1988 are not state officials at all, and the award of fees against them is not an award against the State. *See, e.g., Morse v. Republican Party*, 517 U.S. 186 (1996), *on remand*, 972 F. Supp. 355 (W.D. Va. 1997) (*mem.*).

ARGUMENT

1. Consideration Whether NHEMA Has a Federal Right Enforceable Under 42 U.S.C. § 1983 Is Foreclosed by the Law of the Case.

Petitioner seeks review of the issue whether NHEMA had a federal right enforceable under § 1983 in the first instance. The Fourth Circuit has held twice that petitioner waived that issue by failure to appeal from the district court's judgment on the merits. Petitioner now asserts that this Court rescued it from its default by remanding the case for reconsideration in light of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). But nothing in the mandate prevented the Fourth Circuit from finding a procedural default.

The case of *Gonzaga Univ. v. Doe* dealt with the standards for determining whether there was a federal right enforceable by action under § 1983. In this case, NHEMA, which was the plaintiff below, filed a § 1983 action to enforce federal rights of its members under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06. In its decision on the merits, the district court found that there was a federal right enforceable under § 1983. *National Home Equity Mortgage Ass'n v. Face*, 64 F. Supp. 2d 584, 591 (E.D. Va. 1999), *aff'd*, 239 F.3d 633 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001). That ruling was not appealed. *See* Petition, App. 25. The district court was affirmed on appeal.

After denial of certiorari in this Court, the case was remanded to the district court for consideration of NHEMA's claim for attorney's fees under 42 U.S.C. § 1988. At this point, the petitioners challenged NHEMA's status as a prevailing party under 42

U.S.C. § 1983. *See* Petition, App. 24. The district court held that that point had been waived. Petition, App. 25. The district court said:

> However, in the present case, the Court did not hold that the Supremacy Clause created rights enforceable under section 1983. Instead, the Court applied the three-part test set forth in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990), and specifically ruled that NHEMA "has a federally enforceable right under 42 U.S.C. § 1983," the right "to be free of state law." 64 F. Supp. [2d] at 591. Therefore, the exception implied in the final paragraph of *Maryland Pest Control* - that if an action is maintainable under section 1983 as a suit to enforce statutory rights, then there can be an award of attorney's fees under section 1988 - is applicable. An examination of the most recent cases addressing the three-part test to determine whether a statute gives rise to a federal right enforceable under section 1983 supports the Court's previous determination. *See Blessing v. Freestone*, 520 U.S. 329 (1997); *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).
>
> In addition, this decision of the Court was not challenged on appeal by the defendants or the intervenor-defendant. The Court has reviewed the briefs the parties filed in the Fourth Circuit, as well as the opinion of the Fourth Circuit. The appellants failed to appeal the Court's ruling that NHEMA has a federally enforceable right under section 1983. Accordingly, that ruling became the

> law of the case and is binding in these proceedings. *See Suel v. Secretary of Health and Human Services*, 192 F.3d 981, 985-86 n. 2 (Fed. Cir. 1999) ("It is particularly appropriate to invoke law of the case principles when a party has decided not to appeal an issue and further proceedings are conducted in reliance on that decision.")

Petition, App. 24-25. On appeal, petitioners again attempted to raise the issue that NHEMA was not a prevailing party under 42 U.S.C. § 1983, despite the district court's holding that the issue had been waived. The Court of Appeals said:

> When the parties filed cross-motions for summary judgment, they explicitly addressed whether the Parity Act conferred enforceable rights on NHEMA and its members. Virginia argued vigorously that no such rights were created, but NHEMA prevailed on that issue when the district court concluded, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983. . ."
>
> Virginia elected not to challenge the district court's conclusion that the Parity Act conferred a cause of action on NHEMA and its members. Rather, it limited its challenge to whether Virginia law was in conflict with the Parity Act. When we disposed of that issue in favor of NHEMA and its members, NHEMA became a prevailing party on its claims brought under the Parity Act and 42 U.S.C. § 1983.

> While Virginia suggests by implication that perhaps we should now review the question of whether the Parity Act conferred rights on NHEMA, "it is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (citations and internal quotation marks omitted.) Accepting as the law of the case the conclusions that NHEMA has a federally enforceable right under the Parity Act - a conclusion that we do not review - and that NHEMA sought to enforce that right, we find that this case does not fall within the rule announced in *Golden State Transit* and *Maryland Pest Control.*

Petition, App. 14-15. Thus, both the district court and the Court of Appeals recognized as the law of the case the district court's unappealed ruling from the district court's original judgment that NHEMA had a federal right enforceable under 42 U.S.C. § 1983. Under the law of the case, a court should not reopen issues decided at earlier stages of the same litigation. *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

The issue whether there is a federal right enforceable under § 1983 in this case is foreclosed under the law of the case doctrine by the final judgments of the district court and the United States Court of Appeals for the Fourth Circuit, and the denial of the first petition for writ of certiorari by this Court. In other words, the decision in *Gonzaga Univ. v. Doe* might have borne on an issue in the case on the merits, had that issue been preserved, but does not inform consideration of the issue of attorney's fees now before the

Court. That is what the Fourth Circuit clearly said in its published decision following remand.

> Although Virginia did, in the district court, contend that the Parity Act did not confer a right enforceable under 42 U.S.C. § 1983, the district court, applying the jurisprudence of the implied rights of action, *see Gonzaga*, 122 S.Ct. at 2275-77, rejected the argument and concluded that the Parity Act did create an enforceable right. We, however, never had an opportunity to review that ruling ....Thus, we were, and still are, left with the unappealed holding of the district court that the Parity Act created a right of action and that NHEMA prevailed on its assertion of that right of action. Thus, on the issue before us, the holding of *Gonzaga* is irrelevant.

Petition, App. 3-4. The Court of Appeals nevertheless recognized that the district court had applied the principles, if not the letter, of *Gonzaga* when it ruled in favor of NHEMA.

2. There Has Been No Change in the Controlling Law Because the Federal Right Invoked Was Explicitly Created in a Class of Intended Beneficiaries Including NHEMA's Members.

Under the facts of this case, there has been no change in the controlling law as a result of *Gonzaga Univ. v. Doe*. This is not a case in which there is an attempt to imply or infer a federal right. In its decision below in *National Home Equity Mortgage Ass'n v. Face* ("*Face I*"), 64 F.Supp.2d at 591, the district court tested NHEMA's claim under the three-part test in *Wilder v. Virginia Hosp. Ass'n*,

496 U.S. 498, 509 (1990). The court concluded that NHEMA met the *Wilder* test, holding that its members were intended beneficiaries of the right to make alternative mortgage transactions free of state regulation. *Id.*

When the ruling, unchallenged on appeal, was contested by appellants in the district court proceeding on attorney's fees, the district court revisited and reaffirmed its decision, noting that subsequent rulings in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000), supported the court's previous determination. *National Home Equity Mortgage Ass'n v. Face*, No. 398 (E.D. Va., Apr. 5, 2001), at 3; Petition, App. 24-25.

Wilder and *Blessing v. Freestone* are cases discussed and cited, not overruled, in *Gonzaga Univ. v. Doe*. While the Court noted that certain language in *Blessing* had been misinterpreted, it cited *Blessing* twice for the proposition that § 1983 protects against violations of federal rights, not merely against violations of federal law. 536 U.S. at 282-83. Tested against the standard as clarified in *Gonzaga Univ. v. Doe*, the district court's decision in *Face I* is in full accord, as the Court of Appeals observed. *See* Petition, App. 3-4. The district court found that there was a specific federal right -- a present right to be free of state law -- created in intended beneficiaries -- nonfederally chartered housing creditors. *Face I*, 64 F.Supp.2d at 591; *see also* Petition, App. 24.

The operative language of the Parity Act states:

> It is the purpose of this title to eliminate the discriminatory impact that [federal] regulations have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by

> authorizing all housing creditors to make, purchase and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies.

12 U.S.C. § 3801(b)

> In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to the making, purchasing, and enforcing alternative mortgage transactions, housing creditors may make, purchase and enforce alternative mortgage transactions ...

12 U.S.C. § 3803(a)

> An alternative mortgage transaction may be made by a housing creditor in accordance with this section, *notwithstanding any State constitution, law, or regulation.*

12 U.S.C. § 3803(c) (emphasis added). The intent to create a specific federal right for housing creditors to make alternative mortgage transactions in accordance with federal regulations and without interference from state law could not be clearer.

The purpose of the Parity Act was to grant state-chartered mortgage lenders the right to make mortgage loans on the same terms as federally chartered lenders. *National Home Equity Mortgage Ass'n v. Face*, 239 F.3d at 635-36. As such, its sole purpose was to use the preemptive power of federal law to create a federal right for housing creditors. The right was explicit, not implicit. Even

petitioners disputed only the scope, not the fact, of federal preemption creating a federal right in housing creditors. *See id.* at 636.

In *Gonzaga Univ. v. Doe*, 536 U.S. at 276-77, the Court was considering the question of enforceability of the Federal Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, under 42 U.S.C. § 1983, an issue on which the federal courts had divided. The Court also sought to resolve ambiguities apparent in its jurisprudence setting standards for determining whether there is a federal right subject to enforcement under § 1983. *Id.*

The Court held that it was rare that federal spending legislation such as FERPA could give rise to enforceable federal rights. *Gonzaga*, 536 U.S. at 280-81. The Parity Act, however, unlike FERPA, is not spending legislation. It was enacted under Congress' power to regulate interstate commerce. *Face 1*, 64 F.Supp.2d at 512.

The *Gonzaga* court then analyzed what is required (1) to create a federal right, and (2) to show that such federal right is enforceable under § 1983. The Court held that these were distinct inquiries. 536 U.S. at 283. The first inquiry is whether Congress intended to confer individual rights upon a particular class of beneficiaries. *Id.* For a statute to create such rights, it must be "phrased in terms of the persons benefited." 536 U.S. at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979). Once the plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983. *Gonzaga*, 536 U.S. at 284. The State may rebut this presumption by showing that Congress specifically foreclosed enforcement under § 1983. *Id.* at 284 n.4.

Applying these tests to the Parity Act shows beyond question that the Act creates a specific right in housing creditors to make alternative mortgage transaction free of state regulation if they conform to federally prescribed standards. The whole purpose of the Parity Act was to create a right for nonfederally chartered housing creditors to make alternative mortgage transactions under federal regulations. The intent of Congress to create the right of housing creditors to make such transactions is stated in explicit and unambiguous language. 12 U.S.C. § 3801(b). The right is phrased in terms of the persons benefited, and confers the right on an identifiable class. 12 U.S.C. §§ 3801(b), 3803(a), (c).

The Act by its terms permits enforcement of the transactions it authorized "notwithstanding any State constitutional, statutory, or regulatory provision". 12 U.S.C. § 3803(c). Far from foreclosing enforcement under § 1983, the Act specifically protects the right it creates against interference under color of state law.

The court below already considered and rejected the argument that the Act is not enforceable under § 1983. *Face I*, 64 F.Supp.2d at 591. The Parity Act is not spending legislation, nor does NHEMA's claim of a federal right depend on implication. The purpose of the Parity Act was to create a federal right immune from interference under state law. *Face I*, 64 F.Supp.2d at 591. The Act confers this specific individual federal right upon an identified class. *Id.* It satisfies all of the requirements in *Gonzaga Univ. v. Doe*, just as it satisfies all of the requirements for a federal right enforceable under § 1983 before *Gonzaga Univ. v. Doe*.

3. The Court Has Consistently Held that Congress Abrogated the States' Immunity Against Fee Awards Under § 1988, and Subsequent Decisions Have Not Altered That Conclusion.

Petitioners advance the same argument made in *Hutto*, that the States have sovereign immunity that bars liability for attorney's fees under § 1988, and absent a clear and unmistakable intent to abrogate that immunity by Congress acting pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, the Eleventh Amendment bars any such relief in federal court. *Hutto* rejected that argument. 437 U.S. at 693-95. Nevertheless, petitioners claim that the development of the "clear statement rule" after *Hutto* undermines its reasoning. The Court has already rejected the same argument in 1989 in *Missouri v. Jenkins*, 491 U.S. at 279-80, a case not distinguished, or even cited, by petitioners. Moreover, the Court's recent citation of *Hutto* with approval, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277 (1994), shows that a majority of the present Court regard *Hutto* as settled law.

As relevant here, *Hutto* involved a challenge to an award of attorney's fees under § 1988. The Court held that when Congress enacted § 1988, it undoubtedly intended to exercise its plenary power to set aside the States' immunity from retroactive relief and to authorize fee awards payable by the States when their officials are sued in their official capacities. 437 U.S. at 694. The Court said:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically

> to restrain state action. *See, e.g.*, 42 U.S.C. § 1983.

Id. The Court went on to observe that the legislative history was equally plain. *Id.* Congress stated its specific intent that fee awards would be collected directly from the official in his official capacity, from the funds of his agency or funds under his control, or from the State or local government, regardless whether it was named as a party. *Id.* (citing S. Rep. No. 94-1011, at 5 (1976), *reprinted at* 1976 U.S.C.C.A.N. 5908, 5913). The Court also noted that Congress rejected at least two attempts to amend the Act and immunize state and local governments from fee awards. *Id.*

The Attorney General of Arkansas argued that these plain indications of legislative intent were not enough. *Id.* Instead, he argued, Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity. The attorney general pointed out, like petitioners here, that the Court had refused to impose retroactive liability on States in the absence of an extraordinarily explicit statutory mandate. But the Court held that such cases concerned retroactive liability for prelitigation conduct, rather than expenses incurred in litigation seeking only prospective relief. 437 U.S. at 695. In that context, *Hutto* addressed directly the clear statement argument and rejected it.

Two years later, the Court considered the liability of the Supreme Court of Virginia and its Chief Justice for attorney's fees under § 1988. *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 730-39 (1980). The Court said: "We held in *Hutto v. Finney*, *supra*, that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers . . . based on

express legislative history indicating that Congress intended [§ 1988] to abrogate Eleventh Amendment immunity." *Id.* at 738. In *Kentucky v. Graham*, 473 U.S. 159, 170 (1985), a unanimous Court reaffirmed *Hutto*'s holding that when a State has been prevailed against for relief on the merits in a § 1983 action, fees are available from the State under § 1988.

Then, in *Missouri v. Jenkins*, the Court again confronted the argument that the language of § 1988 was inadequate under the clear statement rule. The *Missouri v. Jenkins* petitioners relied on the Court's further explication of the clear statement doctrine in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985), and *Dellmuth v. Muth*, 491 U.S. 223 (1989). While specifically noting that the petitioners relied on those cases, 491 U.S. at 279, the Court nevertheless reaffirmed its holding in *Hutto* that the Eleventh Amendment immunity of the States was abrogated by Congressional enactment of the 1976 amendment to § 1988. The Court said:

> The flaw in this argument lies in its misreading of the holding of *Hutto*. It is true that in *Hutto* we noted that Congress could, in the exercise of its enforcement power under § 5 of the Fourteenth Amendment, set aside the States' immunity from retroactive damages, and that Congress intended to do so in enacting § 1988. But we also made clear that the application of § 1988 to the States did not depend on congressional abrogation of the States' immunity. We did so in rejecting precisely the "clear statement" argument that Missouri now suggests has undermined *Hutto* . . . .

> The holding of *Hutto*, therefore, was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but rather that the Eleventh Amendment *did not apply* to an award of attorney's fees ancillary to an grant of prospective relief. That holding is unaffected by our subsequent jurisprudence concerning the degree of clarity with which Congress must speak in order to override Eleventh Amendment immunity, and we reaffirm it today.
>
> * * *
>
> There is no need in this case to determine whether Congress has spoken sufficiently clearly to meet a "clear statement" requirement, and it is therefore irrelevant whether the Eleventh Amendment standard should be . . . as stringent as the one we applied . . . in [*Library of Congress v.*] *Shaw* [478 U.S. 310 (1986)].

491 U.S. at 279-81 (emphasis added) (internal citations omitted). The construction of § 1988 was instead a straightforward matter of statutory interpretation. *Id.* at 281-82.

Petitioners here fail to address *Missouri v. Jenkins*. What the Court's opinion in *Missouri v. Jenkins* decisively settles is that the Eleventh Amendment has no application to this case, because this is an award of attorney's fees ancillary to prospective relief against state officials. Furthermore, the settled law is that the test of the effectiveness of that abrogation is not the clear statement rule, a standard the Court has held is irrelevant in this

context. *Missouri v. Jenkins*, 491 U.S. at 281-82. Instead, it is merely a matter of statutory construction. "For this question, it is of no relevance whether the party against which fees are awarded is a State. The question is what Congress intended – not whether it manifested 'the clear affirmative intent ... to waive the sovereign's immunity.'" *Id.* at 282 (citation omitted).

4. The States' Historical Liability for Costs in Federal Court Provides Sufficient Basis for the Award of Fees Apart from Any Considerations of Immunity.

Quite apart from the Court's consistent holding that Congress has, to the extent necessary, in fact abrogated the States' Eleventh Amendment immunity against awards of attorney's fees under § 1988, such awards are fully justified under the Court's alternative rationale in *Hutto*. The Court held that § 1988 imposed attorney's fees as part of costs, and costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. 437 U.S. at 695. "The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Id.*

In fact, the Court's subsequent jurisprudence has emphasized the cost prong of *Hutto*'s analysis. *See Missouri v. Jenkins*, 491 U.S. at 278-80. Petitioners challenge *Hutto*'s analysis factually and legally, asserting first that attorney's fees were not recoverable as costs in 1796 when the Eleventh Amendment was adopted, and next that Congress lacks the power to "evade" the Eleventh Amendment by "redefining" costs.

Petitioners are wrong as a matter of historical fact in asserting that attorney's fees were never awardable as costs. Petitioners cite the Court's discussion of the historical

treatment of attorney's fees in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249-50 (1975), to support the propositions that (1) attorney's fees were not recoverable against any party in federal court in 1796, Petition, at 12-13; and (2) Congress cannot "circumvent sovereign immunity by changing a definition of 'costs' that prevailed when the Constitution was ratified and that dates back through the centuries of the common law." Petition, at 19. Neither averment is accurate.

Alyeska cited *Arcambel v. Wiseman,* 3 U.S. (3 Dall.) 306 (1796), for its holding that the judiciary would not create a general rule, independent of statute, allowing awards of attorney's fees in federal court. 421 U.S. at 249. *Arcambel* involved the award of attorney's fees as damages, not as costs. *Id.* at 249-50. The opinion in *Alyeska* goes on to show that petitioners' historical view is simply wrong. Costs, of course, are not a creature of the common law. *Id.* at 247. But statutory authorization for award of costs, including attorney's fees, has existed in England for centuries. *Id.* "As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs." *Id.* at 247 n.18 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967)).

Again, contrary to petitioners' recitation, in 1793 Congress enacted legislation providing that the same costs should be taxed in the federal courts, including for "attornies and counsellors' fees", as were allowed in the supreme or superior courts of the respective states. *Alyeska*, 421 U.S. at 248 n.19 (citing 1 Stat. 333, § 4). This provision was in effect until 1799, *id.*, and thus in effect when the Eleventh Amendment was adopted in 1798. Although the statute expired by its terms, the same practice,

referring to state rules governing awards of counsel fees, prevailed in the federal courts from 1799 until 1853. *Id.* at 250.

In 1853, Congress enacted an statute standardizing costs allowable in federal litigation. *Alyeska*, 421 U.S. at 251. Under the statute, the amount of counsel fees collectible from the opposing party was limited to the amount specified in the act. *Id.* at 252. It was asserted in support of the legislation that losing litigants were being unfairly saddled with exorbitant fees of the prevailing parties' attorneys. *Id.* at 251. It was also noted that all sixteen states in the Union at the time the system was adopted had laws that prescribed taxable costs for attorney's fees. *Id.* at 251 n.24.

The set attorney's fee taxable as costs has been carried forward in the federal statutes. *Id.* at 252-57. The provision setting the amount of the fee taxable to the losing party as a cost is now codified at 28 U.S.C. § 1923(a), and, as relevant here, is still twenty dollars as it was in 1853. 28 U.S.C. § 1923(a).

In Virginia, litigants have been liable for costs that included statutory attorney's fees since at least 1761. *See* 7 Hening's Statutes at Large 400-01. Substantially the same provisions remained in effect throughout the period of ratification of the Constitution and adoption of the Eleventh Amendment. *See* I Rev. Code of Va. (1819), ch. 76, §§ 14-17. Under Virginia law, as it was in effect before, during, and after the ratification of the Constitution and the adoption of the Eleventh Amendment, the taxable attorney's fees were the only fees counsel was permitted to receive. *See* I Rev. Code of Va. (1819), ch. 76, § 15. As shown above, these provisions were also in effect in the federal courts in Virginia after 1793. There has been no provision excusing the Commonwealth from such awards of costs.

Furthermore, just as in the federal system, there remains in effect a statutory provision in the state system for taxation of attorney's fees as costs that does not exempt the State. *See* Va. Code Ann. § 17.1-624.

The Court in *Alyeska* concluded that the determination of the circumstances in which awards of attorney's fees would be allowed was a matter for Congress to determine as a matter of statute. 421 U.S. at 262. In adopting § 1988, Congress did not alter the definition of costs. It simply increased them. The federal statutory definition of costs has included certain fixed attorney's fees since before the Civil War. *Hutto*, 437 U.S. at 697. The fact that Congress has increased the amount of fees recoverable does not implicate the Eleventh Amendment. *Id.* at 696.

Thus, the historical analysis of the allowance of attorney's fees as costs on which the Court relied in *Hutto* was, in fact, far stronger in its factual predicate than the Court set forth in its opinion. Before, during, and after adoption of the Eleventh Amendment, the state and federal courts in Virginia routinely awarded attorney's fees as part of costs. Moreover, the historical record also refutes petitioners' claim that Congress lacked the legal power to "change" the definition of costs. Statutory costs have always included attorney's fees. "It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity." *Hutto*, 437 U.S. at 698.

The rationale of the cost prong of the Court's analysis is sufficient by itself to uphold the award of fees in this case and in § 1983 cases generally.

5. Because Petitioners Seek Wholesale Overruling of the Court's Prior Decisions, Considerations of Stare Decisis Weigh Heavily Against Granting the Writ On the Remaining Argument Based on the Rule in *Hensley v. Eckerhart.*

When a litigant comes before the Court asking to sweep away so broad a body of settled authority as petitioners seek here, the first hurdle is surely stare decisis. Considerations of stare decisis have special force in the area of statutory construction. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). In statutory construction, unlike constitutional interpretation, Congress's legislative power is implicated, and remains free to alter what the Court has done. Thus, the Court accords weight to Congress's continued acceptance of the Court's earlier holdings, because Congress could have corrected the Court's statutory construction if Congress disagreed with it, but has chosen not to so. *Id.* Because § 1988 has been amended since *Hensley*, Congress has clearly acquiesced in its holding. *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998).

The differing treatment of plaintiffs and defendants under § 1988 is grounded in clear and explicit legislative history. *Hensley*, 461 U.S. at 429. Just as is the case with *Hutto*, and as demonstrated even more recently, the majority of the Court regard *Hensley* as settled law. *Buckhannon Bd. & Care Home, Inc. v. West Va. Dept. of Health & Human Resources*, 532 U.S. 598, 603 n.4 (2001). In fact, the Court noted its specific reliance on the legislative history that the petitioners urge the Court to reject, stating that it had relied on the same legislative history in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989), *Maher v. Gagne*, 448 U.S. 122, 129 (1980), and *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980) (*per*

curiam), and would do so again. *Buckhannon*, 532 U.S. at 607.[1]

Under § 1988, when the State or its officials in their official capacities are defendants, they are treated no differently from any other defendants. When they are plaintiffs, they are treated no differently from other § 1983 plaintiffs. If one accepts for the sake of argument the undemonstrated premise of petitioners' argument, that State officials are more likely to be defendants in § 1983 cases, that is because § 1983 is a statute addressed to abuses under color of state law. This is an effect of the intent and subject matter of the particular statute, not a discriminatory application of § 1988. If anything, state officials are treated more favorably, because Congress recognized that fee awards may be paid by the State rather than the individuals. State officials often have been, as here and as in *Hutto*, represented by the state attorney general. Non-governmental § 1983 litigants generally lack such advantages.

In other cases subject to § 1988, such as actions under 42 U.S.C. §§ 1981, 1982, or 2000d, it might be rare for state officials to be defendants, but such private parties would not be heard to claim that the law was discriminatory. *See, e.g.*, *Morse v. Republican Party*, 517 U.S. 186 (1996), *on remand*, 972 F. Supp. 355, 359 (W.D. Va. 1997) (fees assessed against state political party and county party committee under § 1988).

The petitioners' argument is simply a plain language argument for a construction of the statute that ignores abundant evidence of Congressional intent. The Court has

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[1] Although the issue before the Court was different in *Buckhannon* and the cases cited, the Court could have added *Hutto* to the list of cases in which it had relied specifically on the legislative history of § 1988. *See Hutto*, 437 U.S. at 694.

indicated repeatedly, most recently last year, that it will continue to rely on the legislative history of § 1988 in construing the statute. Congress's intent is plain. To overturn the Court's longstanding construction of the statute now would merely invite a legislative response to restore what the Court has already recognized as clear Congressional intent.

CONCLUSION

The court below correctly applied the doctrine of law of the case to preclude further review of an issue waived on appeal on the merits. Furthermore, the lack of application of *Gonzaga* to the Parity Act is too clear to warrant a further remand.

As to their remaining arguments, the petitioners propose a radical overhaul of the nation's civil rights jurisprudence. Their arguments, however, proceed from dissent to dissent in advocating the adoption today of positions and arguments already rejected by the Court. As the Court held *in Missouri v. Jenkins*, *Hutto*'s reasoning survived *Atascadero State Hosp.* and *Dellmuth v. Muth.* There is no reason to conclude that the same reasoning is not proof against the same arguments, whether they are based on *Atascadero* and *Dellmuth v. Muth* or on *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706 (1999). After *Missouri v. Jenkins,* much as petitioners may want to impose it, the Eleventh Amendment simply has no applicability to a fee award under § 1988.

Petitioners have advanced no sound reason for the Court to retreat from its long-settled rulings and from what is not only a significant number of decisions of this Court, but a vast number of decisions in the federal courts below

made in reliance on *Hutto v. Finney* and *Hensley v. Eckerhart*.

Therefore, respondent National Home Equity Mortgage Association prays that the Court will deny the petition for writ of certiorari and allow settled federal law to remain settled.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
AUG 15 2003
OFFICE OF THE CLERK

No. 02-1810

In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONER

Nothing in respondent's brief in opposition calls into question the need for this Court to grant, vacate, and remand or, alternatively, to review and reverse the decision below.

First, the respondent does not seriously dispute that the court of appeals misapplied the directions given by this Court when it acted favorably on the Commonwealth's previous petition for certiorari. Nor does it attempt to assert that the law of the case doctrine *precluded* the court of appeals from reconsidering its earlier decision in light of *Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2275-77 (2002). Rather, respondent simply asserts that the court of appeals had discretion to ignore this court's directive and refuse to reconsider.

Second, the respondent does not contest that this Court's sovereign immunity jurisprudence is fundamentally different than it was a generation ago when *Hutto v. Finey*, 437 U.S. 678 (1978), was decided. Nor does it even attempt to demonstrate that, under current jurisprudence, *Hutto* is decided correctly. Rather, respondent, ignoring the jurisprudence of the last decade, simply asserts that *Hutto* should be allowed to stand.

Third, the respondent does not dispute that "if Congress intends to alter the usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1990). Nor does it even attempt to argue that, in enacting 42 U.S.C. § 1988, Congress clearly and unambiguously stated its intention *within the statutory text* to impose an attorney's fees regime that discriminates against the States. Rather, respondent, again ignoring this Court's most recent pronouncements, asserts that *Hensley v. Eckert*, 461 U.S. 424 (1983), is properly decided and should not be revisited.

I. This Court should grant the petition, vacate the judgment below, and remand with an explicit statement that the law of the case doctrine does not apply and that the court of appeals should reexamine whether, in light of *Gonzaga*, the respondent's suit is a § 1983 claim.

A. The law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power.*" *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (emphasis added). "*A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance*, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (emphasis added) (citations omitted). In other words, the doctrine is not jurisdictional; it is merely prudential. Thus, the court of appeals had the authority to revisit the issue of whether respondent's suit was a § 1983 claim.

Nevertheless, the respondent, apparently conceding the court of appeals' authority to revisit the issue, asserts that the court of appeals acted properly when it declined to do so. This is wrong for two reasons. First, any discretion that the court of appeals had to decline to reexamine the issue was foreclosed by this Court's explicit directive to reconsider. Second, if the court of appeals had discretion, then it abused that discretion by declining to reconsider. The issue of whether respondent's suit was a § 1983 claim should be decided in light of the *current* jurisprudence. To refuse even to consider the impact of a recent pronouncement of this Court is the epitome of an abuse of discretion.

B. Respondent asserts that *Gonzaga* has no impact on the issue of whether respondent's suit was, in fact, a § 1983 claim. *See Response Brief* at 9-13. For the reasons set forth on pages 10-12 of the Petition, the Commonwealth disagrees. Yet, the fact that the respondent and the

Commonwealth disagree about the impact of *Gonzaga* only underscores the need for the court of appeals to actually decide whether the respondent's suit was a § 1983 claim. The court of appeals has not decided the issue. This Court should not deny certiorari because the court of appeals *might* have agreed with respondent. Rather, this Court should instruct the court of appeals to actually *decide* if it agrees with respondent, which is essentially what this Court did when it remanded the case previously.

II. Alternatively, if this Court concludes that granting, vacating, and remanding is inappropriate, then this Court should grant review as to the second and third questions presented.

A. If a decision "was not correct when it was decided, and it is not correct today," then the decision "ought not to remain binding precedent." *Lawrence v. Texas,* 123 S. Ct. 2472, 2484 (2003). Indeed, this Court has shown a particular willingness to revisit its decisions concerning the role of the States in "our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). For example, in 1989, this Court held that Congress could use its general Article I powers to abrogate the sovereign immunity of the States. *See Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). Yet, a mere seven years later, this Court held that abrogation of sovereign immunity was possible only if Congress exercised its powers under § 5 of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44, 57-64 (1996). Similarly, in 1964, this Court held that mere participation in interstate commerce constituted a waiver of a State's sovereign immunity. *See Parden v. Terminal Railroad*, 377 U.S. 184 (1964). In 1999, this Court reexamined its decision and overruled it. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 679-83 (1999). With this petition, the Commonwealth of Virginia asserts that *Hutto* and *Hensley* were wrong when they were decided and they are wrong today. Given this

Court's recent pronouncements on the principles of "dual sovereignty," this Court should reconsider whether *Hutto* and *Hensley* ought to remain as binding precedent.

B. Respondent's opposition to the reconsideration of *Hutto* altogether ignores the fact that, in the last few years, this Court's sovereign immunity jurisprudence has undergone a dramatic transformation.

1. As explained in more detail in the petition, *Seminole Tribe* and its progeny hold that congressional abrogation of sovereign immunity can be accomplished only if (1) Congress unequivocally expressed its intent to abrogate immunity for claims based on a specific statute; and (2) Congress acted pursuant to § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 56-59. In deciding whether Congress acted pursuant to § 5 of the Fourteenth Amendment, this Court requires application of the two-part test from *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Even where Congress has passed a statute implicating the substantive guarantees of the Fourteenth Amendment, it may not abrogate sovereign immunity for that statute unless it can (1) "identify conduct transgressing the Fourteenth Amendment's substantive provisions" and (2) "tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999).

Yet, respondent ignores these developments and argues that this Court's reaffirmation of *Hutto* in *Missouri v. Jenkins*, 491 U.S. 274 (1989), makes it unnecessary to reexamine *Hutto* in light of more recent precedent. *Respondent's Brief* at 14-18. Respondent misses the point. *Jenkins* was decided at the same time as *Union Gas*, where this Court substantially expanded Congress' power to abrogate sovereign immunity. Given that *Seminole Tribe* repudiated *Union Gas*, there must be serious doubt about the continued viability of *Hutto*. Respondent's

reliance on *Jenkins*, to the exclusion of more recent relevant cases, neatly underscores the need for this Court to revisit the question.

Quite simply, this Court has not yet applied its post-*Seminole Tribe* analytical framework to § 1988. As explained in the petition, that analysis raises a serious question whether § 1988 is a valid abrogation of sovereign immunity, at least in the context of a 42 U.S.C. § 1983 claim to enforce the Parity Act, 12 U.S.C. § 3801. The writ should be granted so that this Court may consider whether its previous interpretation of § 1988 meets the *Seminole Tribe* standard.

2. Respondent, apparently realizing that § 1988 does not meet the *Seminole Tribe* standard, argues that there is an alternative basis for the result in *Hutto*. Specifically, the respondent contends that the States historically have been liable for attorneys' fees as part of costs in federal court regardless of sovereign immunity concerns. *Respondent's Brief* at 18-21. In support of its novel contention, the respondent notes that the English Parliament and the colonial legislatures occasionally passed statutes that authorized courts to impose attorney fee liability on common litigants as part of costs. The Congress enacted similar measures at various times. Because common litigants were sometimes liable for attorneys' fees as part of costs, the respondent asserts that the States were liable for attorneys' fees as part of costs regardless of sovereign immunity.

This assertion is seriously flawed. It ignores the fundamental distinction between a common litigant, such as a private party or a corporation or even a local governmental entity, and a *sovereign*, such as the Crown, the United States itself, or one of the States. Quite simply, the mere fact that common litigants in the federal courts sometimes were liable for attorneys' fees as part of costs does not necessarily mean that the sovereigns, the United States and the States, were liable for attorneys' fees as

part of costs. Indeed, this Court has repeatedly recognized that, under basic principles of federalism, statutes that are applicable to common litigants are not applicable to the States.[1] *See Raygor v. Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002) (federal law which tolls statute of limitations on state law claims in federal court was inapplicable to the States); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (The False Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70 (States may not be subjected to 42 U.S.C. § 1983 claims for damages). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (explicitly declining to rule on the issue of whether there is a private right of action to enforce Title VI against States). In other words, if respondent wishes to claim that the States historically have been subject to attorneys' fees as part of costs in federal courts, then the respondent must demonstrate that the States themselves, rather than common litigants, were subject to such liability. This they cannot do.

The States historically were not subject to liability for attorneys' fees in the federal courts for the simple reason that the States historically were not subject to the jurisdiction of the federal courts. *See Federal Maritime Comm'n*, 122 S. Ct. at 1870-71. *See also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857 (1824) (holding that sovereign immunity barred a suit against the

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[1] Respondent's reference to English practice is unpersuasive for the additional reason that the English rule concerning attorneys' fees is in sharp contrast to the American rule, where the opposite approach is generally followed. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 240, 247 (1975). Thus, even if the English rule allowed attorneys' fees to be awarded against the Crown – a claim not even respondent makes – it would not mean that an analogous practice was in place in America when the Constitution was ratified. "Of course, it is the American rather than the English common law tradition that is relevant." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

States). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden v. Maine*, 527 U.S. 706, 748 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). This was true even if a state officer, rather than the State itself was named. *See Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 122-23 (1828). Indeed, it was not until 1908 that this Court firmly established jurisdiction to enjoin state officers who were violating federal law, *see Ex Parte Young*, 209 U.S. 123 (1908), and it was not until 1976 that this Court recognized a congressional power to abrogate sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In sum, historically the States were not subject to the jurisdiction of the federal courts. Therefore, respondent is incorrect in its contention that the States have been historically subject to liability for attorneys' fees as part of costs in federal court.[2]

C. Additionally, this Court should grant review in order to reconsider *Hensley*.

1. Over the past two decades, this Court has recognized that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" to be disregarded. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by

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[2] There may have been an exception for original jurisdiction actions filed by one state against another in the Supreme Court pursuant to Article III, § 2 of the Constitution. In such cases, the sovereign immunity of one litigant is counter-balanced by the sovereign immunity of the other, so that special rules may apply. In any event, the requirement that States reimburse the tribunal for the costs of litigation is fundamentally different from paying the legal fees of a private litigant.

O'Connor, J., concurring). To protect the delicate balance between the States and the federal government, this Court has insisted that the sovereignty of the States can only be diminished by a clear expression of congressional intent contained in the statutory text. *See Raygor*, 122 S. Ct. at 1006. In other words, if Congress is going to impose a scheme where those who sue the States and prevail will recover fees as a matter of course, but that prevailing States will recover fees in only the rarest of circumstances, the actual statutory text of § 1988 must say exactly that.

Respondent, apparently realizing that there is nothing in the text of § 1988 to support the result in *Hensley*, insists that the Clear Statement Rule should not apply. Instead, the respondent asserts that there is "abundant evidence of Congressional intent," and that this Court relies on "the legislative history of § 1988 in construing the statute." *Respondent's Brief* at 23-24. Respondent again ignores the fact that States, as sovereigns in our constitutional system, are fundamentally different from private parties or local governmental actors. As noted above, this Court has repeatedly recognized this distinction. *See Raygor*, 122 S. Ct. at 1006 (federal law tolling statute of limitations on state law claims in federal court was inapplicable to claims against States); *Vermont Agency of Natural Resources*, 529 U.S. at 779 (the False Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70. (States may not be subjected to 42 U.S.C. § 1983 claims for damages.).

2. Finally, the respondent simply misconceives the fundamental nature of the question when it asserts that States "are treated no differently from any other *defendants*." *Respondent's Brief* at 23 (emphasis added). The issue is not that State defendants are treated differently from private parties who may be named as § 1983 defendants. The issue is that, under *Hensley*, State defendants are treated unfavorably compared to the private *plaintiffs* who have brought them into Court. The prevailing private

plaintiff is almost always allowed to collect attorneys' fees; the prevailing State defendant is almost never allowed to collect them. Even if the definition of costs could be legislatively expanded to include attorneys' fees, this uneven treatment is inconsistent with the even-handed approach that has traditionally governed the allocation of costs.[3] A departure from this traditional even-handedness may be constitutional where sovereign immunity is not an issue, or where sovereign immunity has been properly abrogated under Section 5 of the 14th Amendment; however, it cannot be sustained where – as here – the entire argument for subjecting States to attorneys' fees is based on the theory that it is *traditional* to do so. The Commonwealth has demonstrated why such a reading of American legal *tradition* is untenable; but, if that reading is to be accepted, then certainly the States must be entitled to its benefits as well as it burdens.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, a writ of certiorari should be granted, the judgment vacated, and the matter remanded to the court of appeals with an explicit directive that the court of appeals should reexamine whether, in light of *Gonzaga*, the respondent's suit is a § 1983 claim. If this Court concludes that granting, vacating, and remanding is

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[3] This tradition of even-handedness is demonstrated by respondent's reliance on *Alyeska* for the proposition that "since 1607 English courts have been empowered to award counsel fees to defendants *in all actions where such awards might be made to plaintiffs*." Br. in Opp. at 10 (quoting *Alyeska*, 421 U.S. at 247 n.18 (1975)) (emphasis added).

inappropriate, then this Court should grant review as to the second and third questions presented.

Respectfully submitted,

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August 14, 2003